

No. 15-1363
Vide 15-1358, 15-1359

Title:	Dennis Hasty, et al., Petitioners v. Ahmer Iqbal Abbasi, et al.
Docketed:	May 10, 2016
Linked with 15A897	
Lower Ct:	United States Court of Appeals for the Second Circuit
Case Nos.:	(13-981, 13-999, 13-1002, 13-1003, 13-1662)
Decision Date:	June 17, 2015
Rehearing Denied:	December 11, 2015

Questions Presented

~~Date~~~	~~~~~~~Proceedings and Orders~~~~~~~~~~~~~~~~~~~~~
Feb 29 2016	Application (15A897) to extend the time to file a petition for a writ of certiorari from March 10, 2016 to April 11, 2016, submitted to Justice Ginsburg.
Feb 29 2016	Application (15A897) granted by Justice Ginsburg extending the time to file until April 11, 2016.
Apr 1 2016	Application (15A897) to extend further the time from April 11, 2016 to May 9, 2016, submitted to Justice Ginsburg.
Apr 4 2016	Application (15A897) granted by Justice Ginsburg extending the time to file until May 9, 2016.
May 6 2016	Petition for a writ of certiorari filed. (Response due June 9, 2016)
May 6 2016	Appendix of Dennis Hasty, et al. filed.
May 26 2016	Order extending time to file response to petition to and including August 8, 2016.
Jun 8 2016	Brief amici curiae of Former U.S. Attorneys General William P. Barr, et al. filed. VIDED.
Jun 8 2016	Waiver of right of Federal Respondents to respond filed.
Jun 14 2016	Waiver of right of respondent James W. Ziglar to respond filed.
Aug 8 2016	Brief of respondents Ahmer Iqbal Abbasi, et al. in opposition filed. VIDED.
Aug 23 2016	Reply of petitioners Dennis Hasty, et al. filed.
Sep 21 2016	DISTRIBUTED for Conference of October 7, 2016.
Oct 11 2016	Petition GRANTED The petitions for writs of certiorari in Nos. 15-1358 and 15-1359 are granted. The cases are consolidated and a total of one hour is allotted for oral argument. Justice Sotomayor and Justice Kagan took no part in the consideration or decision of this petition.
Nov 10 2016	Letter from the Solicitor General regarding case caption. VIDED
Nov 18 2016	Joint appendix filed. VIDED.
Nov 18 2016	Brief of petitioners Dennis Hasty, et al. filed.
Nov 25 2016	Brief amici curiae of Former U.S. Attorneys General William P. Barr, et al. filed. VIDED.
Dec 2 2016	Application (16A546) of respondents to file a consolidated brief on the merits in excess of the word limit, submitted to Justice Ginsburg. VIDED.
Dec 2 2016	Application (16A546) granted by Justice Ginsburg to file a consolidated brief of respondents on the merits is excess of the word limit. VIDED.
Dec 7 2016	Record requested from the U.S.C.A. 2nd Circuit.

Dec 12 2016	CIRCULATED.
Dec 12 2016	Motion of petitioners to enlarge the time for oral argument and for divided argument filed. VIDED.
Dec 19 2016	Brief of respondents Ahmer Iqbal Abbasi, et al. filed. VIDED. (Distributed)
Dec 20 2016	Brief amici curiae of Professors of Civil Procedure filed. VIDED. (Distributed)
Dec 22 2016	Brief amicus curiae of Commonwealth Lawyers Association filed. VIDED. (Distributed)
Dec 22 2016	Brief amici curiae of Medical and Other Scientific and Health-Related Professionals filed. VIDED. (Distributed)
Dec 23 2016	Brief amici curiae of Immigration Detention Advocacy Organizations filed. VIDED. (Distributed)
Dec 23 2016	Brief amicus curiae of The American Association for Justice filed. VIDED. (Distributed)
Dec 27 2016	Brief amici curiae of Former Correctional Officials filed. VIDED. (Distributed)
Dec 27 2016	Brief amici curiae of The American Civil Liberties Union, et al. filed. VIDED. (Distributed)
Dec 27 2016	Brief amici curiae of Americans United for Separation of Church and State, et al. filed. VIDED. (Distributed)
Dec 27 2016	Brief amici curiae of Asian Americans Advancing Justice, et al. filed. VIDED. (Distributed)
Dec 27 2016	Brief amici curiae of Karen Korematsu, et al. filed. VIDED. (Distributed)
Jan 6 2017	The motion of petitioners for enlargement of time for oral argument and for divided argument is granted in part and denied in part, and the time is divided as follows: 20 minutes for the Acting Solicitor General on behalf of petitioners in Nos. 15-1358 and 15-1359, 10 minutes for petitioners in No. 15-1363, and 30 minutes for respondents. Justice Sotomayor and Justice Kagan took no part in the consideration or decision of this motion. VIDED.
Jan 11 2017	Reply of petitioners Dennis Hasty and James Sherman. filed. (Distributed)
Jan 18 2017	SET FOR ARGUMENT on Wednesday, January 18, 2017. VIDED
Jan 18 2017	Argued. For petitioners in 15-1358 and 15-1359: Ian H. Gershengorn, Acting Solicitor General, Department of Justice, Washington, D. C. For petitioners in 15-1363: Jeffrey A. Lamken, Washington, D. C. For respondents: Rachel Meeropol, New York, N. Y. VIDED.
Jun 19 2017	Adjudged to be REVERSED IN PART and VACATED and REMANDED IN PART. Kennedy, J., delivered the opinion of the Court with respect to Parts I, II, III, IV-A, and V, in which Roberts, C. J., and Thomas and Alito, JJ., joined, and an opinion with respect to Part IV-B, in which Roberts, C. J., and Alito, J., joined. Thomas, J., filed an opinion concurring in part and concurring in the judgment. Breyer, J., filed a dissenting opinion, in which Ginsburg, J., joined. Sotomayor, Kagan, and Gorsuch, JJ., took no part in the consideration or decision of these cases. VIDED.

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RECORD AND BRIEFS

15-1363

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

DENNIS HASTY AND JAMES SHERMAN,
Petitioners,

v.

IBRAHIM TURKMEN, AKHIL SACHDEVA,
AHMER IQBAL ABBASI, ANSER MEHMOOD,
BENAMAR BENATTA, AHMED KHALIFA,
SAEED HAMMOUDA, AND PURNA BAJRACHARYA,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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QUESTIONS PRESENTED

This putative class action was filed by foreign nationals who were illegally in the United States and detained following the September 11th terrorist attacks. The FBI designated respondents as "of interest" or "high interest" to its investigation into the attacks; Bureau of Prisons policy mandated that detainees so designated be housed in the most restrictive conditions permissible. Respondents brought this action seeking to hold petitioners Dennis Hasty and James Sherman, who were the Warden and Associate Warden at the Metropolitan Detention Center, personally liable in damages, along with others. Respondents claim that Hasty and Sherman should be liable because (*inter alia*) they concluded—and thus "knew"—that *the FBI* lacked evidence to support its terrorism designations for respondents. The questions presented are:

1. Whether, as the Second Circuit held, the judicially implied cause of action for damages against individual officials recognized in *Bivens* v. *Six Unknown Named Agents*, 403 U.S. 388 (1971), extends to this context.

2. Whether qualified immunity was properly denied, notwithstanding the specific circumstances confronted by petitioners—including the FBI's terrorism designations for respondents—because the Constitution "clearly" prohibits any "condition of pretrial detention not reasonably related to a legitimate governmental objective," Pet. App. 57a-58a, or imposed "because of * * * race, ethnicity, religion, and/or national origin," *id.* at 72a-73a.

3. Whether the allegations against Hasty and Sherman—such as the assertion that they "knew" the FBI's terrorism designations for respondents were wrong but imposed otherwise mandatory confinement conditions because they had discriminatory intent—are sufficiently plausible to state a claim under *Ashcroft* v. *Iqbal*, 556 U.S. 662 (2009).

PARTIES TO THE PROCEEDINGS BELOW

Ibrahim Turkmen, Akhil Sachdeva, Ahmer Iqbal Abbasi, Anser Mehmood, Benamar Benatta, Ahmed Khalifa, Saeed Hammouda, and Purna Raj Bajracharya were plaintiffs and/or plaintiffs-intervenors in the district court and appellees-cross-appellants in the court of appeals.

Dennis Hasty, Michael Zenk, and James Sherman were defendants in the district court and appellants in the court of appeals.

John Ashcroft, Robert Mueller, and James W. Ziglar were defendants in the district court and cross-appellees in the court of appeals.

Asif-Ur-Rehman Saffi, Syed Amjad Ali Jaffri, Shakir Baloch, Hany Ibrahim, Yasser Ebrahim, and Ashraf Ibrahim were plaintiffs in the district court but did not participate in the appeals that are the subject of this petition.

Salvatore Lopresti,[1] Joseph Cuciti, Christopher Witschel, Clemett Shacks, Brian Rodriguez, Jon Osteen, Raymond Cotton, William Beck, Steven Barrere, Lindsey Bledsoe, Howard Gussak, Marcial Mundo, Daniel Ortiz, Stuart Pray, Elizabeth Torres, Phillip Barnes, Sydney Chase, Michael Defrancisco, Richard Diaz, Kevin Lopez, Mario Machado, Michael McCabe, Raymond Mickens, Scott Rosebery, and James Cuffee were defendants in the district court, but did not participate in the appeals that are the subject of this petition.

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[1] Mr. Lopresti filed a notice of appeal but did not pay a filing fee or file a brief. His appeal was accordingly dismissed under Federal Rule of Appellate Procedure 31(c).

Omer Gavriel Marmari, Yaron Shmuel, Paul Kurzberg, Silvan Kurzberg, Javaid Iqbal, Ehab Elmaghraby, and Irum E. Shiekh were intervenors in the district court, but did not participate in the appeals that are the subject of this petition.

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IN THE

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DENNIS HASTY AND JAMES SHERMAN,

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v.

IBRAHIM TURKMEN, AKHIL SACHDEVA,
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SAEED HAMMOUDA, AND PURNA BAJRACHARYA,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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PETITION FOR A WRIT OF CERTIORARI

Dennis Hasty and James Sherman respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-156a) is published at 789 F.3d 218 (2d Cir. 2015). The opinion of the district court (Pet. App. 157a-226a) is published at 915 F. Supp. 2d 314 (E.D.N.Y. 2013).

STATEMENT OF JURISDICTION

The court of appeals entered judgment on June 17, 2015. Pet. App. 2a. It denied rehearing and rehearing en banc on December 11, 2015. *Id.* at 228a. On February 29, 2016, Justice Ginsburg extended the time to file a petition for a writ of certiorari to and including April 11, 2016. On April 4, 2016, Justice Ginsburg further extended the time to file a petition to and including May 9, 2016. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Relevant provisions of the U.S. Constitution and Title 42 of the U.S. Code are set forth in the appendix. Pet. App. 241a-243a.

PRELIMINARY STATEMENT

This *Bivens* action—sustained by the Second Circuit over a six-judge dissent from denial of rehearing en banc—arises from the detention of illegally present foreign nationals in an effort "to safeguard our country in the immediate aftermath of the 9/11 attacks." Pet. App. 231a. The panel decision rests on the following premise: Presented with the FBI's national-security terrorism designations for those detainees, local prison officials were required by "clearly established law" to disregard the FBI's designations and substitute their own supposed views about the detainees' terrorism connections. For not doing so, those local jailers must face personal damages liability under *Bivens*.

The Second Circuit's decision to allow *Bivens* claims in this extraordinary context, its ruling that the allegations here meet the plausibility requirement of *Ashcroft* v. *Iqbal*, 556 U.S. 662 (2009), and its denial of qualified immunity, all defy this Court's directives. As the panel dis-

sent and the six-judge dissent from denial of rehearing en banc explain, the decision below has spawned multiple circuit conflicts. It threatens potential havoc for crisis and national-security responses, where officers often must rely on the judgments of superior officials with superior access to national-security information. And it "raises questions of exceptional importance meriting further review." Pet. App. 232a.

STATEMENT

This putative class action was filed by foreign nationals who were in the United States illegally and detained after the 9/11 terrorist attacks. They seek damages under *Bivens* from petitioners Dennis Hasty and James Sherman ("Hasty and Sherman"), as well as former Attorney General John Ashcroft, former FBI Director Robert Mueller, and former INS Commissioner James Ziglar (the "DOJ Defendants").

I. Proceedings In District Court

A. Respondents' Claims

Respondents were arrested on immigration charges following the 9/11 terrorist attacks. Most respondents were detained in the Metropolitan Detention Center ("MDC") in Brooklyn, New York. Petitioners Hasty and Sherman were, respectively, the Warden and Associate Warden for Custody at MDC.[1]

Before being sent to MDC, respondents were designated by the FBI as "of interest" or "high interest" to the

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[1] Two respondents were housed in the Passaic County Jail. Hasty and Sherman had no involvement with that institution, and the Passaic detainees' claims against Hasty and Sherman were dismissed. See Pet. App. 195a n.16. Accordingly, "respondents" herein refers only to the claimants detained at MDC.

9/11 investigation. Pet. App. 294a (¶ 143), 302a (¶ 169), 307a-308a (¶ 187), 314-315a (¶ 211), 319a (¶ 226), 321a (¶ 233). Bureau of Prisons ("BOP") policy required detainees so classified to be held under "'the most restrictive and secure conditions permitted.'" *Id.* at 49a. Such detainees could not be released until the FBI affirmatively cleared them of any connection to terrorism. See *id.* at 18a; see also *id.* at 263a (¶ 55), 392a-393a, 411a-412a. Consequently, respondents were confined in the "ADMAX SHU," a special wing of MDC with particularly restrictive confinement conditions.

Respondents do not challenge their detention. Rather, they challenge the highly restrictive confinement conditions. They do not, however, claim that those conditions—referred to as "official conditions"—are *never* permissible. Respondents agree such conditions are appropriate, for example, for suspects with genuine terrorism connections. See Oral Argument at 1:36:58, *Turkmen* v. *Hasty*, No. 13-981 (2d Cir. May 1, 2014); Pet. App. 45a. But they urge it was unlawful to impose those conditions *on them* because they did not actually have terrorism connections. Pet. App. 49a-51a; see also *id.* at 270a (¶ 69), 271a (¶ 73). In essence, respondents allege that Hasty and Sherman violated respondents' "clearly established" rights because they supposedly "knew" the FBI's "of interest" designations were unfounded, and failed to disregard those designations by imposing less-restrictive conditions (in violation of BOP policy) based on their own putative views. See *id.* at 50a-56a.

Respondents also challenge unauthorized conduct by individual corrections officers—referred to as "unofficial conditions"—including verbal abuse and rough treatment. See Pet. App. 52a-55a; *id.* at 273a (¶ 77), 283a (¶ 105), 284a (¶ 109). Respondents do not claim Hasty or Sher-

man observed or engaged in such conduct. See *id.* at 52a-55a.

Of the operative Complaint's seven counts, four remain. Three assert claims under *Bivens*. Count 1 alleges that the conditions of confinement were punitive and violated due process. Count 2 asserts an equal-protection violation, alleging respondents were held in restrictive conditions based on race, ethnicity, and/or national origin. Count 6 asserts that respondents were subject to unreasonable and punitive strip searches in violation of the Fourth and Fifth Amendments. Count 7 asserts a claim under 42 U.S.C. §1985(3), alleging that Hasty, Sherman, and the DOJ Defendants conspired to violate respondents' equal-protection rights.[2]

B. The District Court's Ruling

Initial proceedings in this case culminated in remand for reconsideration in light of *Ashcroft* v. *Iqbal*, 556 U.S. 662 (2009). On remand, respondents filed the Fourth Amended Complaint ("Complaint"). The district court granted the DOJ Defendants' motions to dismiss, and denied Hasty's and Sherman's in relevant part. See Pet. App. 157a-226a.

1. In *Bivens* v. *Six Unknown Named Agents*, 403 U.S. 388 (1971), this Court first recognized a cause of action for damages against individual officers for constitutional violations. The district court recognized that, since 1980, this Court has refused to extend *Bivens* to any new contexts. Pet. App. 212a; see *Iqbal*, 556 U.S. at 675 (*Bivens* action "disfavored").

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[2] Count 3, a free-exercise claim, was rejected on appeal. Pet. App. 27a. The dismissal of Counts 4 and 5, *id.* at 202a-211a, was not appealed, *id.* at 20a n.13.

The district court thus explained that *Bivens* will not be extended if "special factors" counsel hesitation. Pet. App. 215a-216a. "Special factors" include "'military concerns,'" "'national security concerns,'" and "'foreign policy considerations.'" *Id.* at 216a. The district court recognized that this case involves an "extraordinary factual context." *Turkmen* v. *Ashcroft*, No. 02-cv-2307, 2006 WL 1662663, at *30 (E.D.N.Y. June 14, 2006). But it ruled that there was no reason to examine whether "special factors" counseled hesitation before allowing a *Bivens* claim here because respondents' claims would not require it to "extend" *Bivens* to a "new context." Courts, it declared, had previously allowed ordinary prisoners' conditions-of-confinement and equal-protection claims under *Bivens*. See Pet. App. 184a-185a n.10, 194a n.15, 221a-223a. In the district court's view, neither the terrorist attacks of 9/11, nor respondents' desire to hold Hasty and Sherman liable for following FBI terrorism designations, rendered this context different from those cases. *Id.* at 184a-185a n.10, 194a n.15.

2. The district court also ruled that the Complaint satisfies *Ashcroft* v. *Iqbal*, 556 U.S. 662. Under *Iqbal*, "well-pleaded factual allegations" must "plausibly give rise to an entitlement to relief." *Id.* at 679. The court applied *Iqbal* to the "official conditions" and "unofficial conditions" separately. Regarding the Fifth Amendment challenge to official confinement conditions (Counts 1 and 6),[3] the court held that Hasty's and Sherman's "punitive intent" plausibly could be inferred from the conditions themselves. Pet. App. 192a. As to unofficial conditions,

[3] The court addressed the Fifth Amendment component of Count 6, which challenged strip searches, alongside the official-conditions claims in Count 1. Pet. App. 221a n.30.

the court identified no indication that Hasty or Sherman had mistreated any prisoner. But it found respondents' allegations of deliberate indifference sufficient. *Ibid.*

The district court also sustained the equal-protection claim (Count 2). The Complaint, it held, plausibly alleged Hasty and Sherman had imposed restrictive conditions because of respondents' race, religion, and/or national origin. The court invoked allegations that Hasty and Sherman learned that "the FBI had not developed any information to tie [respondents] to terrorism." Pet. App. 201a. From that, it held, one could infer petitioners imposed restrictive conditions based on race or religion (as opposed to the obligation to follow FBI designations and BOP policy). The district court also upheld respondents' Fourth Amendment challenge to strip searches (Count 6), finding the Complaint sufficiently alleged that those searches lacked "legitimate penological purpose." *Id.* at 222a. Finally, the court held that respondents adequately pleaded a conspiracy claim under §1985(3) because Hasty and Sherman had agreed to "implement[] the facially discriminatory harsh confinement policy." *Id.* at 224a.

3. The district court denied qualified immunity. Addressing the due-process conditions-of-confinement claims (Counts 1 and 6), the court found it clearly established in 2001 that pretrial detainees could not be subject to "punitive conditions of confinement." Pet. App. 193a. It reached the same conclusion on the equal-protection claim (Count 2): "[E]xpressly singling out Arabs and Muslims for harsh conditions of confinement," the court held, violated clearly established law. *Id.* at 201a. As for the Fourth Amendment strip-search claim (Count 6), the court ruled that "[i]t was clearly established * * * that a strip search policy designed to punish and humiliate was

not reasonably related to a legitimate penological purpose." *Id.* at 223a.

The district court denied qualified immunity on the § 1985(3) conspiracy claim. The court acknowledged that "it may not have been clearly established in 2001" that § 1985 reached conspiracies by federal officers. Pet. App. 225a. But it denied qualified immunity because no federal official could have reasonably believed it "'legally permissible'" to conspire, regardless of the legal "'source'" of respondents' right. *Ibid.* (emphasis omitted).

4. The district court dismissed the claims against the DOJ Defendants, holding that the Complaint did not meet *Iqbal*'s requirements. Pet. App. 158a-159a.

II. Proceedings In The Second Circuit

A. The Panel Decision

A divided panel of the Second Circuit affirmed as relevant to Hasty and Sherman and reversed as to the DOJ Defendants, reinstating the claims against them. Judge Raggi issued a 91-page dissent.

1. The panel majority first addressed whether the judicially created *Bivens* action extends to this context. Pet. App. 21a-29a. The majority did not dispute that, for more than three decades, this Court has refused to extend *Bivens* to any new contexts or categories of defendants. The majority likewise agreed that "context" encompasses more than the identity of the constitutional right allegedly violated. For example, while this Court had extended *Bivens* to certain employment-related equal-protection claims, *Davis* v. *Passman*, 442 U.S. 228, 230-231, 248-249 (1979), it refused to extend *Bivens* to such claims in the military context, *Chappell* v. *Wallace*, 462 U.S. 296, 298, 305 (1983). See Pet. App. 23a-24a & n.15. But the majority ruled that the context here—a

national-security response to an unprecedented terrorist attack—was not "new," and it required no inquiry into whether special factors preclude *Bivens*' extension.

When deciding whether a context is "new," the majority declared, courts should look to (a) the "rights injured" and (b) the "mechanism of injury." Pet. App. 24a. The "rights injured" here, it stated, were "substantive due process and equal protection," and the "mechanism of injury" was "punitive conditions without sufficient cause." *Ibid.* The majority thus equated this case with garden-variety conditions-of-confinement challenges by commonplace prisoners in ordinary circumstances. The context, it declared, was: "federal detainee Plaintiffs, housed in a federal facility, alleg[ing] that individual federal officers subjected them to punitive conditions." *Ibid.*

In defining the "context," the majority declined to consider any national-security, foreign-relations, or other issues related to the detention of aliens following a terrorist attack. It did not ask "who should decide whether [to provide] such a remedy" in this context, Congress, or the courts. *Bush* v. *Lucas*, 462 U.S. 367, 380 (1983). And it did not consider whether special factors counsel hesitation before offering a court-created *Bivens* remedy for claims that local jailers should have ignored FBI terrorism designations based on their own putative conclusions. Instead, it held that, because ordinary prisoners previously had been permitted to bring conditions-of-confinement claims in ordinary contexts, respondents here could as well. Pet. App. 23a-24a n.15.

2. The majority then turned to the Complaint's adequacy under *Iqbal* and to qualified immunity.

Counts 1 and 6 (Confinement Conditions). The majority did not deny that the official conditions imposed

here—the "'most restrictive and secure conditions permitted,'" Pet. App. 49a—were lawful under certain circumstances. Nor did it dispute that BOP policy obligated Hasty and Sherman to impose those conditions on detainees designated "of interest" (or higher) to the 9/11 investigation, including respondents. And the majority admitted that Hasty's and Sherman's "responsibility to carry out" that directive from BOP superiors "would not sustain liability." *Ibid.*

The majority held, however, that the Complaint adequately pleaded due-process claims because Hasty and Sherman allegedly knew the "FBI lacked any individualized suspicion for many" detainees but imposed restrictive conditions anyway. Pet. App. 50a-51a. The majority stated that Hasty and Sherman received "regular written updates" describing why each detainee was arrested and "'all evidence relevant to the danger he might pose'" to the prison. *Id.* at 50a. Because those updates did not link respondents to terrorism, the majority reasoned, the Complaint plausibly alleged that Hasty and Sherman "knew" the FBI's "of interest" designations were unfounded and, as a result, should have been disregarded. *Id.* at 50a-52a.

The majority also relied on Hasty's and Sherman's alleged approval of a putatively "false" document stating that respondents had been classified as "suspected terrorists" and designated as "High Security" based on "individualized assessment[s]." Pet. App. 51a. The Complaint alleged that Hasty and Sherman approved that document knowing no individualized assessments had occurred. *Id.* at 51a-52a.

Turning to the unofficial conditions (unauthorized abuse by guards), the majority determined that the Complaint satisfied *Iqbal* with respect to Hasty. Pet. App.

54a-55a. The majority relied on allegations that "Hasty avoided evidence of detainee abuse" by "'neglecting to make rounds on the ADMAX [SHU].'" *Id.* at 54a. It invoked general allegations that Hasty became aware of abuse and "encouraged" harsh treatment by "referring to" the detainees "as terrorists." *Id.* at 55a.[4]

The majority denied qualified immunity. At the time Hasty and Sherman acted, the majority stated, it was "clearly established that * * * a condition of pretrial detention not reasonably related to a legitimate governmental objective is punishment" that violates the "constitutional rights of detainees." Pet. App. 55a-56a. It did not address the specific circumstances Hasty and Sherman confronted—whether it was clearly established that Hasty and Sherman were constitutionally required to disregard the FBI's designations if they subjectively believed them erroneous.

Count 2 (Equal Protection). The majority invoked similar reasoning to hold that Count 2 stated a plausible equal-protection claim, relying almost exclusively on the allegedly "untruthful" document supposedly approved by Hasty and Sherman. Given the allegations of "duplicity regarding the basis for confining the 9/11 detainees," the majority concluded, "it is reasonable to infer that Hasty and Sherman approved this false document to justify detaining * * * Arabs and Muslims in harsh conditions * * * based on discriminatory intent." Pet. App. 67a. The majority denied qualified immunity, reasoning that "it was clearly established * * * that it was illegal to * * * target [respondents] for mistreatment because of their

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[4] The unofficial-conditions claims against Sherman were dismissed. Pet. App. 55a.

race, ethnicity, religion, and/or national origin." *Id.* at 71a.[5]

Count 7 (§ 1985(3)). Finally, the court addressed the allegations that Hasty and Sherman violated § 1985(3) by conspiring to violate respondents' equal-protection rights. The majority acknowledged that, under the intra-enterprise conspiracy doctrine, members of a single entity—like the Department of Justice, which includes the BOP—cannot conspire for purposes of § 1985(3). But it refused to "decid[e] as a matter of law that" BOP and DOJ comprised one entity, remanding that issue to the district court. Pet. App. 79a-80a.

The majority denied qualified immunity as well. It did not dispute that, in 2001, it was *not clear* that § 1985(3) extended to federal officers. Nor did it dispute uncertainty over whether § 1985(3) covered the alleged conspiracy here given the intra-enterprise conspiracy doctrine. Pet. App. 80a & n.46. The majority nevertheless denied immunity because federal officials could not reasonably believe it permissible to conspire with other federal officials to violate equal-protection rights. *Id.* at 80a-81a.

3. On respondents' cross-appeal, the majority reversed dismissal of the DOJ Defendants. It held that the Complaint met *Iqbal*'s plausibility requirement and denied qualified immunity. Pet. App. 30a-47a, 59a-65a, 71a-72a.

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[5] The majority also found the Complaint's Fourth Amendment strip-search allegations adequate and denied qualified immunity. Pet. App. 72a-77a.

B. Judge Raggi's Dissent

Judge Raggi dissented. In her 91-page dissent, she urged that this case presented a "new context" replete with special factors making *Bivens*' extension inappropriate. Pet. App. 87a-113a. She concluded that the allegations were insufficient under *Iqbal*, and that defendants were entitled to qualified immunity. *Id.* at 113a-156a.

C. The Six-Judge Dissent from Denial of Rehearing En Banc

The Second Circuit denied rehearing en banc by an evenly divided vote. Agreeing with Judge Raggi's dissent, the six dissenting judges observed that this case "raises questions of exceptional importance meriting further review." Pet. App. 232a.

The panel decision, they explained, placed the Second Circuit "at odds" with four "sister circuits" and made the Second Circuit the first court of appeals to imply "a *Bivens* damages action * * * for actions taken to safeguard our country in the immediate aftermath of the 9/11 attacks." Pet. App. 231a, 233a. The dissenters deemed it obvious that the context was "new" and involved sensitive matters—like immigration and national security—that rendered *Bivens*' expansion inappropriate. *Id.* at 233a-236a. The panel had reached the opposite conclusion only by "redefining the few established *Bivens* contexts at an impermissibly 'high level of generality.'" *Id.* at 233a-234a. In doing so, the panel "avoid[ed] its obligation" to consider special factors when deciding whether authorization of a damages action "in th[ese] unprecedented legal and factual circumstances" should come from Congress or the courts. *Ibid.*

The dissenters also urged that the panel's qualified-immunity analysis warranted further review. They ob-

served that, under *Mullenix* v. *Luna*, 136 S. Ct. 305 (2015), qualified immunity must be granted unless the rights asserted "were so clearly established with respect to the '*particular* conduct' and the '*specific* context' at issue that every reasonable official would have understood that his conduct was unlawful." Pet. App. 237a (emphasis added). The panel had cited no case providing that clarity. *Ibid.*

The panel decision, moreover, diluted *Iqbal*'s requirement that plaintiffs "plead a plausible claim grounded in a factual basis"—not facts "'merely consistent with a defendant's liability.'" Pet. App. 238a. The panel sustained the Complaint, the dissenters urged, based on "hypothesized possibilities" and "conclusory assumptions or insinuations." *Ibid.* The "need to ensure faithful adherence to the *Iqbal* pleading standard" thus supported further review. *Id.* at 238a-239a.

REASONS FOR GRANTING THE PETITION

As six judges of the Second Circuit have urged, this case presents "questions of exceptional importance." Pet. App. 232a. The decision below puts the Second Circuit "at odds" with four other circuits and "controlling * * * precedent" of this Court. *Id.* at 233a. It does not merely hold that *Bivens* extends to a context rife with special factors, including national security, risk to intelligence materials, and foreign-affairs concerns. It also announces a new test for determining *Bivens*' scope that renders that judicially created cause of action almost infinitely elastic. It adopts a qualified-immunity standard this Court rejected decades ago. And it renders *Iqbal*'s "plausibility" requirement virtually meaningless.

Petitioners Hasty and Sherman were jailers at a federal facility where respondents—foreign nationals illegally in the United States—were detained following the 9/11

terrorist attacks. The crux of respondents' claims is that Hasty and Sherman were constitutionally compelled to *disregard* the FBI's terrorism designations, and to remove respondents from the restrictive confinement conditions required by those designations, because Hasty and Sherman supposedly believed the FBI's designations were wrong.

The panel concluded that *Bivens* extends to that exceptional context—and exposes individual officers to personal liability for damages—without considering the myriad special factors that would ordinarily preclude *Bivens*' expansion. It reasoned that a *Bivens* action exists here because courts had allowed *Bivens* actions by ordinary prisoners, in ordinary circumstances, in ordinary times, to pursue ordinary challenges to confinement conditions. The panel denied qualified immunity, finding it "clearly established" in 2001 that the Constitution required jailers to reject FBI terrorism determinations based on their own conjecture. Finally, the panel's analysis of the claims here, including the allegation that local jailers "knew" the FBI was wrong and should have disregarded its determinations—cannot be reconciled with the plausibility requirement of *Ashcroft* v. *Iqbal*, 556 U.S. 662 (2009).

I. The Case Presents Important Questions—And Circuit Conflicts—Regarding *Bivens*' Scope

In *Bivens* v. *Six Unknown Named Agents*, 403 U.S. 388 (1971), this Court "recognized for the first time an implied private action for damages against federal officers alleged to have violated a citizen's constitutional rights." *Corr. Servs. Corp.* v. *Malesko*, 534 U.S. 61, 66 (2001). For the last 35 years, however, the Court has refused to "extend *Bivens* liability to any new context or new category of defendants." *Id.* at 68. It has declined to

extend *Bivens* to "claims of First Amendment violations by federal employers, *Bush* v. *Lucas*, 462 U.S. 367 (1983), harm to military personnel through activity incident to service, *United States* v. *Stanley*, 483 U.S. 669 (1987); *Chappell* v. *Wallace*, 462 U.S. 296 (1983), and wrongful denials of Social Security disability benefits, *Schweiker* v. *Chilicky*, 487 U.S. 412 (1988)." *Wilkie* v. *Robbins*, 551 U.S. 537, 550 (2007). It has also "seen no case for extending *Bivens* to claims against federal agencies, *FDIC* v. *Meyer*, 510 U.S. 471 (1994), or against private prisons, [*Malesko*, 534 U.S. 61]." *Wilkie*, 551 U.S. at 550.

In the decision below, the Second Circuit held that *Bivens* extends to a new context for which it is singularly ill-suited—"actions taken to safeguard our country in the immediate aftermath of the 9/11 attacks." Pet. App. 231a. Worse, it extended *Bivens* to claims that *local jailers* should have *disregarded* the *FBI*'s terrorism designations. The test the panel adopted invites a vast expansion of *Bivens* without inquiry into the "special factors" that would ordinarily preclude *Bivens*' extension. And the decision creates multiple, acknowledged circuit conflicts in the process. Review is warranted.

A. The Second Circuit's Decision Defies This Court's Special-Factors Framework

"Because implied causes of action are disfavored, the Court has been reluctant to extend *Bivens* liability 'to any new context or new category of defendants.'" *Iqbal*, 556 U.S. at 675. Courts must "'pay[ ] particular heed'" not to expand *Bivens* to a new context where "'special factors counsel[ ] hesitation.'" *Wilkie*, 551 U.S. at 550.

1. "Special factors" includes an array of considerations that weigh against judicial expansion of *Bivens* in the absence of affirmative direction from Congress. They include matters touching on "military, national se-

curity, or intelligence," *Doe* v. *Rumsfeld*, 683 F.3d 390, 394 (D.C. Cir. 2012); cases involving sensitive or classified information, see *Lebron* v. *Rumsfeld*, 670 F.3d 540, 553-554 (4th Cir. 2012); challenges to official "policy," *Malesko*, 534 U.S. at 74; and indications that Congress was aware of the issue but declined to create a statutory damages action, see *Vance* v. *Rumsfeld*, 701 F.3d 193, 201 (7th Cir. 2012) (en banc).

The special-factors inquiry turns not on "the merits of the particular remedy," but on "*who should decide* whether [to provide] such a remedy"—Congress, or the courts. *Bush*, 462 U.S. at 380 (emphasis added). Where "special factors" are present, "Congress is in a far better position than a court to evaluate the impact of a new species of litigation," and courts should not themselves imply a new damages remedy against federal officers. *Id.* at 389.

2. The Second Circuit bypassed the "special factors" analysis here on the theory that it was not extending *Bivens* at all. It did so by adopting an overly generalized—and thus fundamentally flawed—test for determining whether a context is "new." Pet. App. 24a-29a. A context is not "new," the court held, if the "rights injured" and the "mechanism of injury" match those in prior *Bivens* actions. *Id.* at 24a. In this case, the panel identified the injured rights as "substantive due process," "equal protection," and "Fourth Amendment" rights, concluding that *Bivens* actions had been recognized for violations of those rights before. *Id.* at 24a, 28a. It then identified the "mechanism of injury"—"punitive conditions without sufficient cause" and "an unreasonable search performed by a prison official"—and concluded that they were not new. *Ibid.* The court thus defined the "context" here as "federal detainee[s] * * * alleg[ing] that

individual federal officers subjected them to punitive conditions" or "subjected them to unreasonable searches." *Ibid.*[6] At that high level of abstraction, there was no difference between the extraordinary context here—jailers deferring to FBI terrorism designations in the wake of 9/11—and run-of-the-mill prisoner suits alleging "punitive conditions" or "unreasonable searches." *Ibid.*

That now-governing "rights injured"/"mechanism of injury" framework completely decontextualizes "context." Whether *Bivens* should be available is a question of whether Congress or the courts should create the cause of action. As Judge Raggi stated in dissent, "[s]uch a judgment necessarily requires more than the *general* identification of a constitutional right or a mechanism of injury." Pet. App. 90a-91a (emphasis added). "It demands consideration of *all factors* counseling for and against an implied damages action in the *specific legal and factual circumstances presented.*" *Id.* at 91a. (emphasis added). "[W]here a proposed *Bivens* claim presents legal and factual circumstances that were not present in an earlier *Bivens* case, a new assessment is necessary because no court has yet made the requisite 'judgment' that a judicially implied damages remedy is 'the best way' to implement constitutional guarantees in that context." *Ibid.* (quoting *Wilkie*, 551 U.S. at 550).

This case illustrates precisely the error in the panel majority's approach. This case resonates with special factors that compel the conclusion that *Congress*, not the courts, must decide whether to recognize a damages ac-

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[6] Even then, the Second Circuit had to "mix and match a 'right' from one *Bivens* case with a 'mechanism of injury' from another" to conclude that *Bivens* had previously been extended to this context. Pet. App. 92a.

tion against individual officers here. The case concerns the security response to the 9/11 terrorist attacks. It involves FBI terrorism designations for detained foreign nationals, unlawfully present in the United States, following those attacks. And it seeks to hold local jailers liable for not disregarding the FBI's terrorism designations, and the BOP's corresponding mandatory confinement conditions, based on their own alleged conclusions about each detainee's terrorism connections. If this Court's admonition against extending *Bivens* to new "contexts" means anything, a suit arising in such unprecedented circumstances cannot be the same context as an ordinary suit by an ordinary prisoner over ordinary confinement conditions in ordinary times.

The panel's two-step approach thus "invite[s]" *Bivens*' expansion into "every sphere of legitimate governmental action." *Wilkie*, 551 U.S. at 561. "At a sufficiently high level of generality," it is not hard for very different cases to be "analogized to some other claim for which a *Bivens* action is afforded." *Arar* v. *Ashcroft*, 585 F.3d 559, 572 (2d Cir. 2009) (en banc), cert. denied, 560 U.S. 978 (2010). Under the panel's approach, different contexts would rarely qualify as "new," resulting in potential personal liability for government officials regardless of how powerfully special factors weigh against *Bivens*' expansion.

3. The panel's approach also defies this Court's precedents. In *Davis* v. *Passman*, 442 U.S. 228, 230-231, 248-249 (1979), this Court implied a *Bivens* remedy in favor of a former congressional staffer claiming gender discrimination in violation of the Fifth Amendment. Four years later, in *Chappell* v. *Wallace*, 462 U.S. 296 (1983), the Court considered whether *Bivens* could be asserted by U.S. Navy sailors likewise claiming employment discrimination. Under the Second Circuit's "source of

right"/"mechanism of injury" formulation, *Chappell* would not have been a new "context," and *Bivens* would have been available. In both *Chappell* and *Passman*, the source of the right (Fifth Amendment) and the mechanism of injury (discriminatory employment actions) were the same; the "context" of both would have been "claims by government employees that their equal-protection rights were violated by employment discrimination."

But this Court recognized that *Chappell* was a new context; that it implicated different concerns; and that special factors precluded *Bivens*' expansion. The Court considered the "special status" of the *Chappell* plaintiffs' military service, and—most critically—the fact that the claims implicated "the framework of the military establishment." 462 U.S. at 301-303. The Court found a judicial remedy particularly inappropriate given Congress's long-standing "'authority over national defense and military affairs.'" *Id.* at 301. The Second Circuit's framework thus defies common sense and precedent alike.[7]

B. The Decision Below Creates Multiple Circuit Conflicts

The decision below also creates openly acknowledged circuit conflicts over how courts should determine *Bivens*' scope. Pet. App. 233a.

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[7] The Second Circuit characterized *Chappell* as "focus[ing] on the special nature of the employer-employee relationship in the military—or, in other words, the mechanism of injury." Pet. App. 24a n.15. But the Second Circuit ignored the special nature of any "mechanism of injury" here, disregarding national-security concerns and the very different relationship the FBI and local jailers have in identifying terrorist threats. See *id.* at 30a-31a.

1. *The Circuits Are in Conflict Regarding When a* Bivens *Claim Implicates a "New Context" Requiring Special-Factors Analysis*

The Second Circuit's "source of right"/"mechanism of injury" approach places it in conflict with the Fifth, Ninth, and D.C. Circuits. The courts generally agree that the relevant "context" for *Bivens* purposes must be defined in terms of "a potentially recurring scenario that has similar *legal* and *factual* components." *Meshal* v. *Higgenbotham*, 804 F.3d 417, 424 (D.C. Cir. 2015) (emphasis added, quotation marks omitted); *De La Paz* v. *Coy*, 786 F.3d 367, 372 (5th Cir. 2015); *Mirmehdi* v. *United States*, 689 F.3d 975, 981 (9th Cir. 2011); *Arar*, 585 F.3d at 572.

The Fifth, Ninth, and D.C. Circuits apply that standard directly. In *Meshal*, the D.C. Circuit held that *Bivens* could not be extended to the Fourth Amendment claims of an American detained abroad, without a hearing, on suspicion of terrorism. 804 F.3d at 418-420. Declining to look solely at the rights violated (Fourth Amendment) and the mechanism of injury (detention without a hearing), the D.C. Circuit found the context "new" because "the agents' actions took place during a terrorism investigation *and* those actions occurred overseas." *Id.* at 418. The court analyzed "special factors" and determined that they "counsel[ed] hesitation." *Ibid.*

That conflicts with the Second Circuit's decision here. Here, the court allowed a *Bivens* action *despite* the context of a terrorism investigation. By contrast, in *Meshal*, the D.C. Circuit refused a *Bivens* remedy *because* the case implicated a terrorism investigation. As the dissenter in *Meshal* emphasized, the "law enforcement investigations in *Turkmen* were at least as related to the investigation of suspected terrorism as the investigation at

issue" in *Meshal*, "but the Second Circuit found no bar to *Bivens* claims." 804 F.3d at 443 (Pillard, J., dissenting) (citation omitted).

The decision below likewise conflicts with decisions of the Fifth and Ninth Circuits. Both *Coy* and *Mirmehdi* declined to permit Fourth Amendment *Bivens* claims for allegedly unlawful immigration arrests and detention. Although *Bivens* itself was a Fourth Amendment challenge to an unlawful detention, *Bivens*, 403 U.S. at 389-390, *Coy* and *Mirmehdi* held that *immigration* detentions were a new context. As the Ninth Circuit explained, "[d]eportation proceedings are * * * a context[ ] unique from other situations where an unlawful detention may arise." *Mirmehdi*, 689 F.3d at 981. The Fifth Circuit agreed that "deportation proceedings" and actions "under the immigration law constitute new contexts under *Bivens*." *Coy*, 786 F.3d at 375, 377-379.

Under the Second Circuit's approach, however, that context could not have been considered new because the right (Fourth Amendment) and the mechanism of injury (unlawful detention) were the same as in *Bivens* itself. For precisely that reason, Judge Prado (joined by Judges Dennis and Graves) dissented from denial of rehearing en banc in *Coy*, urging that the panel there "reaches the opposite conclusion" from this case and "puts [the Fifth Circuit] in conflict with" the Second. *De La Paz* v. *Coy*, 804 F.3d 1200, 1202 (5th Cir. 2015) (Prado, J., dissenting).

2. *Four Circuits Have Refused To Extend* Bivens *to This Context*

As the six dissenters from denial of rehearing en banc explained, the decision in this case also creates a conflict with four circuits—the Fourth, Seventh, Ninth, and D.C.—that have held that *Bivens* provides no damages

remedy "against executive branch officials for national security actions taken after the 9/11 attacks." Pet. App. 233a. In the decision below, the Second Circuit became "the first [court] in the nation to imply a *Bivens* damages action" in that context. *Id.* at 231a (footnote omitted).

In *Lebron*, the Fourth Circuit refused to extend *Bivens* to claims against Department of Defense officials arising from the seizure of a citizen at O'Hare airport and his detention as an enemy combatant. Special factors counseled hesitation because a *Bivens* remedy would "'intrude upon the authority of the Executive in military and national security affairs.'" 670 F.3d at 549. Whether "the judiciary" should "review and disapprove sensitive military decisions made after extensive deliberations within the executive branch," the court held, is a decision more "'appropriate[ ] for those who write the laws, rather than for those who interpret them.'" *Id.* at 551-552.

The Seventh Circuit and the D.C. Circuit invoked similar concerns when holding that contractors had no *Bivens* action for claims stemming from detentions and interrogations in Iraq. Noting that the "Supreme Court has never implied a *Bivens* remedy in a case involving the military, national security, or intelligence," the D.C. Circuit explained in *Doe* that expanding *Bivens* "would require a court to delve into the military's policies regarding the designation of detainees as 'security internees' or 'enemy combatants,' as well as policies governing interrogation techniques." 683 F.3d at 394, 396. And in *Vance*, the en banc Seventh Circuit held that special factors precluded expanding *Bivens* because, in the national-security context, judges "may lack vital knowledge" that "executive officials possess." 701 F.3d at 200.

Finally, in *Mirmehdi*, the Ninth Circuit refused to allow a *Bivens* action challenging the INS's decision to revoke the plaintiffs' bond based on allegations that they had terrorist ties. Special factors counseled hesitation because "immigration issues 'have the natural tendency to affect diplomacy, foreign policy, and the security of the nation'" and "often involve 'the disclosure of foreign-policy objectives and * * * foreign-intelligence products.'" 689 F.3d at 982-983.

Neither the analyses nor the results in those cases can be reconciled with the decision below. Four circuits recognize that special factors counsel hesitation when a plaintiff seeks to extend *Bivens* to claims touching on national security, foreign affairs, intelligence, and immigration. Those courts concluded that Congress is in a "better position" than the courts "to decide whether or not the public interest would be served by creating" damages liability. *Bush*, 462 U.S. at 390. Here, the Second Circuit reached the opposite result.

C. This Case Demonstrates Why "Special Factors" Analysis Is Critical

This case demonstrates precisely the risks created by the Second Circuit's approach. It is replete with special factors indicating that Congress, not the courts, should decide whether a damages remedy is appropriate.

This case involves national-security actions following the most devastating terrorist attack in American history. "[T]he executive's exercise of national security authority * * * will be *the* critical focus" of this case. Pet. App. 104a. Indeed, the propriety of the FBI's terrorism designations, and the claim that Hasty and Sherman should not have accorded them respect, is central to respondents' claims. See p. 4, *supra*. Respondents, moreover, challenge what *they* characterize as a security "poli-

cy" promulgated by senior Executive Branch officials. Pet. App. 234a. But as this Court has long recognized, "[m]atters intimately related to * * * national security are rarely proper subjects for judicial intervention." *Haig* v. *Agee*, 453 U.S. 280, 292 (1981); see also *Winter* v. *Nat. Res. Def. Council*, 555 U.S. 7, 24, 26 (2008). And "the *Bivens* remedy * * * ha[s] never [been] considered a proper vehicle for altering" government policy. *Malesko*, 534 U.S. at 74. Yet the panel majority refused to address any of those factors or the propriety of affording a *Bivens* action here in light of them.

Cases involving terrorism and national security, moreover, often involve classified or sensitive information that typical prison-conditions cases do not. The disclosure of sensitive or classified information could have disastrous consequences. *Lebron*, 670 F.3d at 554. Because "even inadvertent disclosure may jeopardize future acquisition and maintenance of the sources and methods of collecting intelligence," the potential involvement of such information weighs dispositively against *Bivens*' expansion. *Ibid.* As this Court has observed, "[e]ven a small chance that some court will order disclosure of a source's identity could well impair intelligence gathering and cause sources to 'close up like a clam.'" *CIA* v. *Sims*, 471 U.S. 159, 175 (1985).

It is no answer that the courts can enter protective orders or make case-by-case determinations. If the *context* could implicate sensitive information, whether to create a cause of action—as well as its scope and any means for protecting such information—should be left to Congress. Indeed, the magnitude of risk to sensitive information "often elude[s] judicial assessment." *Lebron*, 670 F.3d at 554. "Unlike the President and some designated Members of Congress, * * * most federal judges [do not] begin

the day with briefings that may describe new and serious threats to our Nation and its people." *Boumediene* v. *Bush*, 553 U.S. 723, 797 (2008). The potential consequences of inadvertent disclosure are "'too obvious to call for enlarged discussion.'" *Dep't of the Navy* v. *Egan*, 484 U.S. 518, 529 (1988).

This case also bristles with foreign-relations concerns. Because "the 9/11 hijackers were all foreign nationals," the government's response "carrie[s] a major immigration law component." Pet. App. 8a. Because of its "'natural tendency to affect diplomacy, foreign policy, and the security of the nation,'" immigration is a field where the judiciary typically stays its hand in deference to the political branches. *Mirmehdi*, 689 F.3d at 982-983.

To the Second Circuit, those considerations were irrelevant. Under its framework, this case arises in the same "context" as any garden-variety case involving "federal detainee[s]" and allegations of "punitive conditions" or "unreasonable searches." Pet. App. 24a, 28a. That utterly acontextual approach to "context" defies the purpose of the special-factors inquiry. If courts are to hear damages actions in this arena, "it should be because the legislative branch has authorized that course." *Lebron*, 670 F.3d at 554. That is so "not only because constitutional authority to" create causes of action rests with the political branches, "but also because that's where the expertise lies." *Vance*, 701 F.3d at 200; see *id.* at 202-203; *Wilson* v. *Libby*, 535 F.3d 697, 710 (D.C. Cir. 2008). Congress has been informed of "the concerns raised in this [particular] lawsuit," yet has provided no damages remedy. Pet. App. 235a; see *Lebron*, 670 F.3d at 551-552; *Vance*, 701 F.3d at 201. The judiciary should not reach out to supply that remedy in Congress's stead.

II. The Second Circuit's Decision Defies This Court's Qualified Immunity Precedents

In denying Hasty and Sherman qualified immunity, the Second Circuit essentially repeated the errors it made in extending *Bivens*—assessing claims at a high level of generality without regard for the particular context. In doing so, the panel again departed from this Court's precedents.

A. The Decision Below Defies Settled Qualified Immunity Principles

To overcome qualified immunity, a plaintiff must show that the defendant's actions violated "clearly established" rights. *Wood* v. *Moss*, 134 S. Ct. 2056, 2061 (2014). "A Government official's conduct violates clearly established law when, at the time of the challenged conduct, '[t]he contours of [the] right [were] sufficiently clear' that every 'reasonable official would have understood that what he is doing violates that right.'" *Ashcroft* v. *al-Kidd*, 131 S. Ct. 2074, 2083 (2011). Courts thus may "not * * * define clearly established law at a high level of generality." *Id.* at 2084.

For example, qualified immunity may not be denied in a Fourth Amendment case simply because the right to be free from unreasonable searches is clearly established by the Fourth Amendment itself. *Anderson* v. *Creighton*, 483 U.S. 635, 639 (1987). Instead, qualified immunity may be denied only if "a reasonable official would understand that *what he is doing*"—in the circumstances he confronted—"violates that right." *Id.* at 640 (emphasis added). The rights thus must be clearly established with respect to the "'particular conduct'" in the "'specific context'" at issue. *Mullenix* v. *Luna*, 136 S. Ct. 305, 308 (2015).

1. In this case, respondents seek to hold Hasty and Sherman liable for obeying FBI terrorism designations, and a BOP policy that required all individuals "of interest" to the terrorism investigation to be detained in the most restrictive conditions permissible. See Pet. App. 17a. The court of appeals did not dispute that adherence to BOP policy was not itself actionable. *Id.* at 49a. But it held that Hasty and Sherman could be liable because, according to the Complaint, they "'were aware that the FBI had not developed any information'" tying respondents "'to terrorism'" but failed to unilaterally *overrule the FBI's terrorism designations* and place respondents in less restrictive conditions. *Ibid.* But no law, much less "clearly established" law, required that. Only a decidedly *unreasonable* jailer would disregard the FBI's terrorism designations, disregard the BOP's policy, and act upon his own terrorism assessment instead.[8]

The Second Circuit denied qualified immunity because it was clearly established "that a particular condition or restriction of pretrial detention not reasonably related to a legitimate government objective is punishment in violation of the constitutional rights of detainees." Pet. App. 47a. But that defies this Court's direction to consider the "'particular conduct'" and "'specific context'" at issue. *Mullenix*, 136 S. Ct. at 308. Courts cannot ask if the general legal standard was clear. *Anderson*, 483 U.S. at 640. They must ask whether every "'reasonable official'" facing *those circumstances* would have understood his

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[8] Courts routinely grant qualified immunity to officials who rely on information received from or determinations made by fellow officers or agencies. See, *e.g.*, *Messerschmidt* v. *Millender*, 132 S. Ct. 1235, 1249 (2012); *United States* v. *Hensley*, 469 U.S. 221, 232-233 (1985); *Elkins* v. *District of Columbia*, 690 F.3d 554, 568 (D.C. Cir. 2012).

conduct to be unlawful. *Ibid.* Consequently, qualified immunity can be denied here only if "clearly established" constitutional principles required Hasty and Sherman to *disregard* the FBI's terrorism designations in favor of their own, subjective conclusions. No such law exists.

2. The panel's approach is especially pernicious because it makes immunity turn on allegations regarding Hasty's and Sherman's subjective beliefs. See Pet. App. 50a. Qualified immunity depends "on the objective reasonableness of an official's conduct." *Harlow* v. *Fitzgerald*, 457 U.S. 800, 818 (1982) (emphasis added). What matters is whether any reasonable officer could have thought it permissible to adhere to the FBI's designations given *the facts* before the officers—not what *these officers* supposedly *believed* based on those facts.

For precisely those reasons, *Brady* v. *Dill*, 187 F.3d 104 (1st Cir. 1999), rejected the argument that officers could be held liable for arresting the plaintiff under a valid warrant because they "knew" the plaintiff was innocent. The plaintiff alleged that the officers "came to believe, with some degree of subjective certainty, that the man they had arrested, though named in the warrant, was innocent of the underlying charge." *Id.* at 113. The First Circuit granted qualified immunity because the officers' "failure to release [the plaintiff] unilaterally once they began to believe that he was innocent" violated no clearly established right. *Id.* at 116. Such "subjective belief," *Brady* explained, "is generally insufficient to justify a police officer's unilateral release of a person who has been lawfully arrested pursuant to a valid judicial order." *Id.* at 113. Indeed, if subjective beliefs controlled, plaintiffs could overcome immunity simply by alleging that the officers "knew" the arrestee was innocent, the

warrant was invalid, etc. The Second Circuit's decision invites precisely that sort of evasion.

B. The Second Circuit's Ruling on § 1985(3) Flouts This Court's Precedents

The Second Circuit's denial of qualified immunity for the § 1985(3) conspiracy claim underscores the need for review. Twice, this Court has held that, when evaluating qualified immunity, "the clearly established right [must] be *the federal right on which the claim for relief is based.*" *Elder* v. *Holloway*, 510 U.S. 510, 515 (1994) (emphasis added). "[O]fficials become liable for damages only to the extent that there is a clear violation of the statutory rights that give rise to the cause of action for damages." *Davis* v. *Scherer*, 468 U.S. 183, 194 n.12 (1984). Thus, in *Davis*, it made no difference that the conduct clearly violated a regulation. Defendants were entitled to immunity on the due-process and § 1983 claims being asserted because *those* provisions did not clearly prohibit the conduct. *Id.* at 194-195 & n.12.

The Second Circuit follows the opposite rule. Whether the claim is under the Fifth Amendment, a federal statute, or some other source, that court held, "is of no consequence to the question of whether the right was clearly established, because the proper inquiry is whether the *right* itself—rather than its *source*—is clearly established." *Russo* v. *City of Bridgeport*, 479 F.3d 196, 212 (2d Cir. 2007); see *Iqbal* v. *Hasty*, 490 F.3d 143, 177 (2d Cir. 2007) (similar). That defies *Elder* and *Davis*. And it was determinative here. The panel conceded that, when Hasty and Sherman acted, it was *not* clearly established that their conduct would violate *§ 1985(3)*'s prohibition on certain conspiracies. It was unclear that § 1985(3) applied to federal officers. See *Hasty*, 490 F.3d at 176. It was also unclear whether, under the intra-enterprise con-

spiracy doctrine, an agreement among officers within a single unit of government—here, the Department of Justice (which includes BOP)—constitutes a conspiracy that violates § 1985(3). Pet. App. 79a-80a.[9] But the panel denied immunity because "'federal officials could not reasonably have believed that it was legally permissible for them to conspire * * * to deprive a person of equal protection of the laws'" regardless of whether the conspiracy would clearly violate *§ 1985*. *Id.* at 81a. That departure from *Elder* and *Davis* warrants review.

III. THE DECISION BELOW EVISCERATES *IQBAL*'S PLAUSIBILITY REQUIREMENT

The court of appeals' decision likewise cannot be reconciled with *Iqbal*'s requirement that a complaint's factual allegations give the claim "facial plausibility." 556 U.S. at 678. Facial plausibility requires more than conjecture. It requires factual allegations that eliminate "'obvious alternative explanation[s]'" for the allegedly unconstitutional conduct. *Id.* at 682.

Here, the court of appeals did not dispute that respondents were lawfully detained. See Pet. App. 237a. Nor did it deny that BOP policy required *all* detainees designated "of interest" (or higher) to be held under restrictive conditions. *Id.* at 17a. And it agreed that respondents had been so designated by the FBI, mandating the conditions Hasty and Sherman allegedly imposed. *Id.* at 18a-19a.

The court of appeals held that respondents nonetheless stated plausible due-process and equal-protection

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[9] It is difficult to imagine, however, that any federal official would understand that acting within the chain of command, pursuant to official policies, could constitute "conspiracy."

claims because the Complaint alleges that Hasty and Sherman knew the "FBI lacked any individualized suspicion for many of the detainees that were sent to the ADMAX SHU." Pet. App. 50a. That supposed knowledge was based on their receipt of "regular written updates" explaining why each detainee was arrested, as well as "'evidence relevant to the danger'" each detainee "'might pose' to the MDC." *Ibid.* Because those "updates" did not tie respondents to terrorist activities, the court held, it was plausible Hasty and Sherman "knew" the FBI's designations were wrong and imposed the restrictive conditions punitively. *Ibid.*

That is not "plausibility" under *Iqbal*. Quite the opposite. It ignores the "'obvious'" and "more likely" explanation for respondents' restrictive confinement—that Hasty and Sherman deferred to the terrorism designations made by the FBI, an agency with far more national-security experience and likely more information than it shared with Hasty and Sherman. Indeed, the Complaint offers no reason why anyone would have believed the FBI was sending, into a prison, "written updates" with *all* potentially sensitive and confidential information about terrorism detainees. The Complaint itself alleges that the updates contained only "'evidence relevant to the danger [the detainees] might pose' *to the MDC*'," Pet. App. 50a (emphasis added)—not necessarily all information intelligence agencies had gathered connecting detainees to terrorism.

The panel's departure from the "plausibility" requirement is underscored by its effort to divine discriminatory intent from a vague allegation that Hasty and Sherman "approved" an unspecified "document," of unstated date and purpose, that was supposedly "false"—"mendac[ious]" in the panel's view—allegedly stating "that the

executive staff at [the] MDC had classified the 'suspected terrorists' as 'High Security' based on an individualized assessment." Pet. App. 66a-67a. As Judge Raggi pointed out, however, the "obvious[ ] and more likely" explanation of the document is that MDC officials were properly "re-l[ying] on the FBI's designations." *Id.* at 151a.[10] Here, too, the panel disregarded *Iqbal*'s requirement that the Complaint dispel "'obvious alternative explanation[s].'" 556 U.S. at 682.

The panel's unofficial conditions analysis waters down *Iqbal* further still. A federal official is not personally liable for the actions of subordinates absent personal involvement in those actions. *Iqbal*, 556 U.S. at 676-677. Yet the Complaint does not allege that Hasty engaged in any abuse, had advance notice of, observed, or ratified any abuse. It alleges Hasty referred to detainees as "terrorists," learned that the BOP was investigating allegations of abuse, and was "made aware" of the abuse. Pet. App. 54a-55a. But those allegations lack the *factual* content needed to plausibly support a claim of personal involvement. And they ignore reality. As Warden, Hasty was responsible for the entire one-million-square-foot MDC facility. And he delegated "direct responsibility for custody operations" of the ADMAX SHU to a BOP Captain on his staff. *Id.* at 401a n.95. To infer personal in-

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[10] The document itself makes that clear. Dated three days after the attacks, before any respondent was housed at MDC, the document does *not* state that *MDC staff* "had classified the 'suspected terrorists' as 'High Security.'" Pet. App. 272a; *id.* at 467a. It says MDC staff "determined" that the detainees "*have been* classified" —presumably by the FBI—"as 'High Security' inmates." *Id.* at 467a (emphasis added). The document, moreover, admonishes MDC staff to show "[p]rofessionalism" and prohibits "humiliat[ing] and provok[ing]" the detainees. *Id.* at 469a. Evidence of mendacity it is not.

volvement in abuse, let alone punitive intent, because Hasty allegedly "'neglect[ed] to make rounds on the ADMAX [SHU] unit,'" *id.* at 54a, ignores that "obvious" and "more likely" explanation.

IV. The Issues Are Important And Recurring

As six Second Circuit judges who dissented from denial of rehearing en banc explained, this case "raises questions of exceptional importance meriting further review." Pet. App. 232a. The panel's expansion of *Bivens*, diminution of qualified immunity, and evisceration of *Iqbal*'s pleading standard invite unwarranted judicial intrusion into Executive Branch functioning on critical matters of national security.

If ever a damages action merited *Congress's* consideration before its creation, it is one arising in the national-security arena—an area that is "rarely [a] proper subject[ ] for judicial intervention." *Haig*, 453 U.S. at 292. By ignoring the national-security context, the foreign-affairs impact, and the potential effects on confidential information, the Second Circuit's decision extending *Bivens* threatens frequent interference in the national-security realm. And the panel's new test for deciding *Bivens*' scope renders the "context" analysis virtually useless as a limiting principle.

The specter of personal *Bivens* liability in such areas, moreover, inevitably leads officers to act with hesitation, rather than the decisiveness the situation may demand. That can have dire consequences in national emergencies. Pet. App. 98a-101a. "Decisions in such situations are more likely than not to arise in an atmosphere of confusion, ambiguity, and swiftly moving events." *Scheuer* v. *Rhodes*, 416 U.S. 232, 246-247 (1974). Officials in such situations "'should not err always on the side of caution' because they fear being sued." *Hunter* v. *Bryant*, 502

U.S. 224, 229 (1991); *see Vance*, 701 F.3d at 200 (noting *Bivens* remedy would "make the Secretary of Defense care less about * * * the best military policy, and more about * * * his own finances").

Especially in times of national emergency, moreover, there is "need for prompt action, and decisions must be made in reliance on factual information supplied by others." *Scheuer*, 416 U.S. at 246. Even in mundane circumstances, "'effective law enforcement cannot be conducted unless police officers can act on directions and information transmitted by one officer to another.'" *United States* v. *Hensley*, 469 U.S. 221, 231 (1985). But the decision below subjects Hasty and Sherman—local jailers—to personal liability for following, rather than countermanding, FBI terrorism designations.

That *Bivens* theory threatens the very idea of chain of command. It cannot be that clearly established law requires jailers to make their own terrorism assessments in disregard of designations made by an agency with far more information and experience in terrorism-related matters. That holding invites chaos. As Judge Raggi explained in dissent, tragedy at the hands of incarcerated terrorists is not hypothetical. Two years before 9/11, a convicted terrorist known as the "Blind Sheikh" used his lawyer to evade security and to encourage renewed attacks. Pet. App. 137a. Another suspected terrorist attacked a prison guard with a pick, inflicting permanent brain damage. *Id.* at 137a-138a. Requiring jailers to ignore FBI terrorism assessments invites repetition of such tragedies.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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No. 15-1363

IN THE

Supreme Court of the United States

DENNIS HASTY AND JAMES SHERMAN,

Petitioners,

v.

IBRAHIM TURKMEN, AKHIL SACHDEVA, AHMER IQBAL ABBASI, ANSER MEHMOOD, BENAMAR BENATTA, AHMED KHALIFA, SAEED HAMMOUDA, AND PURNA BAJRACHARYA,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

APPENDIX TO THE PETITION FOR A WRIT OF CERTIORARI

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APPENDIX A
UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

NOS. 13-981, 13-999, 13-1002, 13-1003, 13-1662

IBRAHIM TURKMEN, AKHIL SACHDEVA, AHMER IQBAL ABBASI, ANSER MEHMOOD, BENAMAR BENATTA, AHMED KHALIFA, SAEED HAMMOUDA, PURNA BAJRACHARYA, ON BEHALF OF THEMSELVES AND ALL OTHERS SIMILARLY SITUATED,

Plaintiffs-Appellees-Cross-Appellants,

v.

DENNIS HASTY, FORMER WARDEN OF THE METROPOLITAN DETENTION CENTER; MICHAEL ZENK, FORMER WARDEN OF THE METROPOLITAN DETENTION CENTER; JAMES SHERMAN, FORMER METROPOLITAN DETENTION CENTER ASSOCIATE WARDEN FOR CUSTODY,

Defendants-Appellants,

JOHN ASHCROFT, FORMER ATTORNEY GENERAL OF THE UNITED STATES; ROBERT MUELLER, FORMER DIRECTOR, FEDERAL BUREAU OF INVESTIGATION; JAMES W. ZIGLAR, FORMER COMMISSIONER, IMMIGRATION AND NATURALIZATION SERVICE,

Defendants-Cross-Appellees,

SALVATORE LOPRESTI, FORMER METROPOLITAN DETENTION CENTER CAPTAIN; JOSEPH CUCITI, FORMER METROPOLITAN DETENTION CENTER LIEUTENANT,

*Defendants.**

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* The Clerk of the Court is directed to amend the caption as set forth above.

Appeal from the United States District Court
for the Eastern District of New York

OPINION

Argued: May 1, 2014
Decided: June 17, 2015

Before POOLER, RAGGI, and WESLEY, Circuit Judges.

Appeal from a January 15, 2013 Memorandum and Order of the United States District Court for the Eastern District of New York (Gleeson, J.) granting in part and denying in part Defendants' motions to dismiss. Cross-appeal from an April 10, 2013 Judgment of the United States District Court for the Eastern District of New York (Gleeson, J.), which was entered pursuant to Rule 54(b) of the Federal Rules of Civil Procedure on April 11, 2013, granting certain Defendants' motions to dismiss. We AFFIRM in part and REVERSE in part. Judge Raggi concurs in part in the judgment and dissents in part in a separate opinion.

POOLER and WESLEY, Circuit Judges.

On September 11, 2001, "19 Arab Muslim hijackers who counted themselves members in good standing of al Qaeda" hijacked four airplanes and killed over 3,000 people on American soil. *Ashcroft* v. *Iqbal* (*Iqbal*), 556 U.S. 662, 682 (2009). This case raises a difficult and delicate

set of legal issues concerning individuals who were caught up in the post-9/11 investigation even though they were unquestionably never involved in terrorist activity. Plaintiffs are eight male, "out-of-status" aliens[1] who were arrested on immigration charges and detained following the 9/11 attacks. Plaintiffs were held at the Metropolitan Detention Center (the "MDC") in Brooklyn, New York, or the Passaic County Jail ("Passaic") in Paterson, New Jersey; their individual detentions generally ranged from approximately three to eight months.

The operative complaint, a putative class action, asserts various claims against former Attorney General John Ashcroft; former Director of the Federal Bureau of Investigation (the "FBI") Robert Mueller; former Commissioner of the Immigration and Naturalization Service (the "INS") James Ziglar; former MDC Warden Dennis Hasty; former MDC Warden Michael Zenk; and former MDC Associate Warden James Sherman.[2] All claims arise out of allegedly discriminatory and punitive treatment Plaintiffs suffered while confined at the MDC or Passaic.

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[1] We use the term "out-of-status" alien to mean one who has either (1) entered the United States illegally and is deportable if apprehended, or (2) entered the United States legally but who has fallen "out of status" by violating the rules or guidelines for his nonimmigrant status (often by overstaying his visa) in the United States and is deportable.

[2] For ease of reference, we refer to Ashcroft, Mueller, and Ziglar collectively as the "Department of Justice ('DOJ') Defendants," and Hasty, Sherman, and Zenk collectively as the "MDC Defendants." The operative complaint also alleges claims against MDC officials Joseph Cuciti and Salvatore Lopresti. Cuciti did not appeal the district court's decision, and Lopresti filed a notice of appeal but did not timely pay the filing fee or file a brief. Lopresti's appeal was dismissed pursuant to Federal Rule of Appellate Procedure 31(c). Thus, we do not address the claims against Cuciti and Lopresti.

BACKGROUND

I. PROCEDURAL HISTORY[3]

Plaintiffs initiated this action over thirteen years ago on April 17, 2002. Over the following two and one-half years, Plaintiffs amended their complaint three times. In June 2006, following a series of motions to dismiss, the district court dismissed Plaintiffs' unlawful-length-of-detention claims but permitted to proceed, *inter alia*, the substantive due process and equal protection claims challenging the conditions of confinement at the MDC. See *Turkmen* v. *Ashcroft* (*Turkmen I*), No. 02 CV 2307(JG), 2006 WL 1662663, at *33-36, 40-41 (E.D.N.Y. June 14, 2006), aff'd in part, vacated in part, *Turkmen* v. *Ashcroft* (*Turkmen II*), 589 F.3d 542 (2d Cir. 2009) (per curiam), remanded to *Turkmen III*, 915 F. Supp. 2d at 314. Plaintiffs and Defendants appealed various aspects of that ruling.

Two significant events occurred while the appeal was pending. First, six of the original eight named Plaintiffs at that time withdrew or settled their claims against the government. See *Turkmen II*, 589 F.3d at 544 n.1, 545. This left only Ibrahim Turkmen and Akhil Sachdeva, both of whom were detained at Passaic, as opposed to the MDC. Second, the Supreme Court issued *Iqbal*, 556 U.S. at 662, which altered the pleading regime governing Plaintiffs' claims. In light of these events and the remaining Plaintiffs' stated desire to replead claims unique to the settling Plaintiffs, this Court affirmed the dismissal of the length of detention claims but vacated and remanded with respect to the conditions of confinement claims. See *Turkmen II*, 589 F.3d at 546-47, 549-50.

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[3] For a more comprehensive review of this case's procedural history, see *Turkmen* v. *Ashcroft* (*Turkmen III*), 915 F. Supp. 2d 314, 331-33 (E.D.N.Y. 2013).

On remand, the district court permitted Plaintiffs to amend their complaint and granted leave for six additional Plaintiffs, all of whom had been held at the MDC, to intervene. The eight current named Plaintiffs are of Middle Eastern, North African, or South Asian origin; six of them are Muslim, one is Hindu, and one is Buddhist. The Fourth Amended Complaint (the "Complaint"), the operative complaint in this case, restates Plaintiffs' putative class claims on behalf of the "9/11 detainees," a class of similarly situated non-citizens who are Arab or Muslim, or were perceived by Defendants as Arab or Muslim, and were arrested and detained in response to the 9/11 attacks.[4]

The Complaint dramatically winnowed the relevant claims and defendants; it alleges seven claims against eight defendants. The first six claims, all brought pursuant to *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), are: (1) a conditions of confinement claim under the Due Process Clause; (2) an equal protection claim alleging that Defendants subjected Plaintiffs to the challenged conditions because of their, or their perceived, race, religion, ethnicity, and/or national origin; (3) a claim arising under the Free Exercise Clause; (4) and (5) two claims generally alleging interference with counsel; and (6) a claim under the Fourth and Fifth Amendments alleging unreasonable and punitive strip searches. The seventh and final claim alleges a conspiracy under 42 U.S.C. § 1985(3). The DOJ

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[4] Benamar Benatta was originally detained by Canadian authorities on September 5, 2001, after crossing the Canadian border with false documentation. Following the September 11 attacks, Benatta was transported back to the United States and detained in the challenged conditions of confinement and pursuant to the post-9/11 investigation; therefore, we call him a "9/11 detainee."

and MDC Defendants moved to dismiss the Complaint for failure to state a claim, on qualified immunity grounds, and, in some instances, based on a theory that *Bivens* relief did not extend to the claim at issue.

II. THE OIG REPORTS

Plaintiffs supplemented the factual allegations in their amended complaints with information gleaned from two reports by the Office of the Inspector General of the United States Department of Justice (the "OIG reports")[5] that documented the federal law enforcement response to 9/11 and conditions at the MDC and Passaic.

The OIG reports, which the Complaint "incorporate[s] by reference except where contradicted by the allegations of [the Complaint]," Compl. ¶3 n.1, see also *id.* ¶5 n.2, play a significant role in this case.[6] Primarily, the

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[5] There are two OIG reports. The first OIG report, published in June 2003, covers multiple aspects of law enforcement's response to 9/11. See U.S. Dep't of Justice, Office of the Inspector General, The September 11 Detainees: A Review of the Treatment of Aliens Held on Immigration Charges in Connection with the Investigation of the September 11 Attacks (April 2003) (the "OIG Report"), available at http://www.justice.gov/oig/special/0306/full.pdf. The second OIG report, published in December 2003, focuses on abuses at the MDC. See U.S. Dep't of Justice, Office of the Inspector General, Supplemental Report on September 11 Detainees' Allegations of Abuse at the Metropolitan Detention Center in Brooklyn, New York (Dec. 2003) (the "Supplemental OIG Report"), available at http://www.justice.gov/oig/special/0312/final.pdf.

[6] Various Defendants challenge the district court's decision to consider the OIG reports to the extent that they are not contradicted by the Complaint. Defendants are correct that a complaint "include[s] any written instrument attached to it as an exhibit or any statements or documents incorporated in it by reference." *Cortec Indus., Inc.* v. *Sum Holding L.P.*, 949 F.2d 42, 47 (2d Cir. 1991); accord *DiFolco* v. *MSNBC Cable L.L.C.*, 622 F.3d 104, 111 (2d Cir. 2010). But their objection misses the point. The district court accurately explained that at the pleading stage, although we must consider the words on the

OIG reports provide invaluable context for the unprecedented challenges following 9/11 and the various strategies federal agencies employed to confront these challenges. The reports help orient our analysis of the Complaint.

III. PLAINTIFFS' ALLEGATIONS[7]

In the aftermath of the 9/11 attacks, the FBI and other agencies within the DOJ immediately initiated an immense investigation aimed at identifying the 9/11 perpetrators and preventing any further attacks. See OIG Report at 1, 11-12. PENTTBOM, the Pentagon/Twin Towers Bombings investigation, was initially run out of the FBI's field offices, but shortly thereafter, Mueller ordered that management of the investigation be switched to the FBI's Strategic Information and Operations Center (the "SIOC") at FBI Headquarters in Washington, D.C. Mueller personally directed PENTTBOM from the SIOC and remained in daily contact with FBI field offices.

In conjunction with PENTTBOM, the Deputy Attorney General's Office (the "DAG's Office") established the

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page (that is, we cannot disregard the fact that the OIG reports make particular findings), we need not consider the truth of those words to the extent disputed by Plaintiffs. See *Turkmen III*, 915 F. Supp. 2d at 342 n.14 (citing *DiFolco*, 622 F.3d at 111). Even were we to view the OIG reports as fully incorporated, reliance on any assertion of fact requires a credibility assessment that we are fundamentally unsuited to undertake at the Rule 12(b)(6) stage. And although the OIG reports cannot determinatively prove or disprove Plaintiffs' allegations, they remain relevant to our analysis because they supplement our understanding of the law enforcement response to 9/11.

[7] The allegations set forth herein are drawn from the Complaint and those portions of the OIG reports incorporated by reference. See *supra* note 6. We presume the veracity of Plaintiffs' well-pleaded allegations. *Iqbal*, 556 U.S. at 679.

SIOC Working Group to coordinate "efforts among the various components within the [DOJ] that had an investigative interest in[,] or responsibility for[,] the September 11 detainees." *Id.* at 15.[8] The SIOC Working Group included representatives from, among other agencies, the FBI, the INS, and the DAG's Office. This group met daily—if not multiple times in a single day—in the months following 9/11; its duties included "coordinat[ing] information and evidence sharing among the FBI, INS, and U.S. Attorneys' offices" and "ensur[ing] that aliens detained as part of the PENTTBOM investigation would not be released until they were cleared by the FBI of involvement with the September 11 attacks or terrorism in general." *Id.*

Given that the 9/11 hijackers were all foreign nationals, the DOJ response carried a major immigration law component. See *id.* at 12. Ashcroft and Mueller developed "a policy whereby any Muslim or Arab man encountered during the investigation of a tip received in the 9/11 terrorism investigation ... and discovered to be a non-citizen who had violated the terms of his visa, was arrested." Compl. ¶1; see also *id.* ¶¶39-49. Ashcroft also created the related "hold-until-cleared" policy, which mandated that individuals arrested in the wake of 9/11 not be released from "custody until [FBI Headquarters] affirmatively cleared them of terrorist ties." *Id.* ¶2; see also OIG Report at 38-39.

Within a week of 9/11, the FBI had received approximately 96,000 tips from civilians across the country. These tips varied significantly in quality and reliability.[9]

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[8] The SIOC Working Group acquired this name because its initial meetings occurred at the FBI's SIOC.

[9] For instance, Turkmen came to the FBI's attention when his landlord called the FBI's 9/11 hotline and reported "that she rented an

"Mueller [nonetheless] ordered that every one of these tips be investigated, even if they were implausible on their face." Compl. ¶40. Ultimately, 762 detainees were placed on the INS Custody List (the "INS List") that then made them subject to Ashcroft's hold-until-cleared policy.

In the months following 9/11, the DOJ Defendants "received detailed daily reports of the arrests and detentions." *Id.* ¶47. Ashcroft and Mueller also "met regularly with a small group of government officials in Washington, D.C., and mapped out ways to exert maximum pressure on the individuals arrested in connection with the terrorism investigation." *Id.* ¶61.[10] This small group "discussed and decided upon a strategy to restrict the 9/11 detainees' ability to contact the outside world and

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apartment in her home to several Middle Eastern men, and she 'would feel awful if her tenants were involved in terrorism and she didn't call.'" Compl. ¶251. "The FBI knew that her only basis for suspecting these men was that they were Middle Eastern; indeed, she reported that they were good tenants, and paid their rent on time." *Id.* Another alien was arrested after the FBI received a tip that stated that the small grocery store where he worked was overstaffed, thus arousing the tipster's suspicions about the "Middle Eastern men" that worked there. OIG Report at 17.

[10] It is unclear whether this "small group" refers to the SIOC Working Group or a distinct group involving Ashcroft, Mueller, and other senior Washington, D.C., officials. One possibility is that Plaintiffs are referring to the small group that consisted of Ashcroft, Mueller, Michael Chertoff, who was then Assistant Attorney General of the Criminal Division, and the Deputy Attorney General. See OIG Report at 13. According to Chertoff, this group discussed the DOJ's post-9/11 law enforcement strategy and policies. Given the makeup of this group and the SIOC Working Group, it is reasonable to infer that information flowed between them; for instance, Chertoff's deputy, Alice Fisher, was placed in charge of immigration issues for the Criminal Division and personally established the SIOC Working Group.

delay their immigration hearings. The group also decided to spread the word among law enforcement personnel that the 9/11 detainees were suspected terrorists[ ] . . . and that they needed to be encouraged in any way possible to cooperate." *Id.*

Plaintiffs, with the exception of Turkmen and Sachdeva, were held at the MDC. Under MDC confinement policy, the 9/11 detainees placed in the MDC were held in the MDC's Administrative Maximum Special Housing Unit (the "ADMAX SHU")—"a particularly restrictive type of SHU not found in most [Bureau of Prisons ('BOP')] facilities because the normal SHU is usually sufficient for correcting inmate misbehavior and addressing security concerns." *Id.* ¶76. The confinement policy was created by the MDC Defendants "in consultation with the FBI." *Id.* ¶65.

Conditions in the ADMAX SHU were severe and began to receive media attention soon after detentions began. See OIG Report at 2, 5. Detainees were: "placed in tiny cells for over 23 hours a day," Compl. ¶5; "strip-searched every time they were removed from or returned to their cell[s], . . . even when they had no conceivable opportunity to obtain contraband," *id.* ¶112; provided with "meager and barely edible" food, *id.* ¶128; denied sleep by "bright lights" that were left on in their cells for 24 hours a day, *id.* ¶119, and, "[o]n some occasions, correctional officers walked by every 20 minutes throughout the night, kicked the doors to wake up the detainees, and yelled" highly degrading and offensive comments, *id.* ¶120; constructively denied recreation and exposed to the elements, see *id.* ¶¶122-23; "denied access to basic hygiene items like toilet paper, soap, towels, toothpaste, [and] eating utensils," *id.* ¶130; and prohibited from moving around the unit, using the telephone freely,

using the commissary, or accessing MDC handbooks, which explained how to file complaints about mistreatment, see *id.* ¶¶76, 83, 129, 140.

MDC staff also subjected the 9/11 detainees to frequent physical and verbal abuse. The abuse included slamming the 9/11 detainees into walls; bending or twisting their arms, hands, wrists, and fingers; lifting them off the ground by their arms; pulling on their arms and handcuffs; stepping on their leg restraints; restraining them with handcuffs and/or shackles even while in their cells; and handling them in other rough and inappropriate ways. See *id.* ¶105; see also Supplemental OIG Report at 8-28. MDC staff also referred to the 9/11 detainees as "'terrorists,' and other offensive names; threaten[ed] them with violence; curs[ed] at them; insult[ed] their religion; and ma[de] humiliating sexual comments during strip-searches." Compl. ¶109. Specifically, Plaintiffs and putative class members at the MDC were referred to by staff as "camel[s]," "fucking Muslims," and "Arabic asshole[s]," *id.* ¶¶110, 147, 218.

The MDC Plaintiffs did not receive copies of the Koran for weeks or months after requesting them, and one Plaintiff never received a copy, "pursuant to a written MDC policy . . . that prohibited the 9/11 detainees from keeping anything, including a Koran, in their cell[s]." *Id.* ¶132. The MDC Plaintiffs were also "denied the Halal food required by their Muslim faith." *Id.* ¶133. And "MDC staff frequently interrupted Plaintiffs' and class members' prayers," including "by banging on cell doors," yelling derogatory comments, and mocking the detainees while they prayed. *Id.* ¶136.

The named MDC Plaintiffs' individual experiences—several of which are highlighted below—add further tex-

ture to their collective allegations concerning the arrest and confinement of the 9/11 detainees.

A. Anser Mehmood

Mehmood, a citizen of Pakistan and devout Muslim, entered the United States on a business visa in 1989 with his wife, Uzma, and their three children. After his visa expired, Mehmood remained in the country and started a trucking business that provided enough earnings to purchase a home in New Jersey and to send funds to his family in Pakistan. In 2000, while living in New Jersey, he and Uzma had their fourth child. In May 2001, Uzma's brother—a United States citizen—submitted an immigration petition for the entire family.

On the morning of October 3, 2001, Mehmood was asleep with Uzma and their one-year-old son when FBI and INS agents knocked on his door. The agents searched Mehmood's home and asked whether he "was involved with a jihad." *Id.* ¶ 157. Mehmood admitted that he had overstayed his visa. The FBI informed Mehmood that they were not interested in him; they had come to arrest his wife Uzma, whose name the FBI had encountered when investigating Plaintiff Ahmer Abbasi, her brother. Mehmood convinced the FBI to arrest him instead of Uzma because their son was still breastfeeding. "The Agent told Mehmood that they had no choice but to arrest one of the parents, but that Mehmood faced a minor immigration violation only, and he would be out on bail within days." *Id.* ¶159.

Upon his arrival at the MDC, Mehmood "was dragged from the van by several large correctional officers, who threw him into several walls on his way into the facility." *Id.* ¶162. "His left hand was broken during this incident" and "[t]he guards threatened to kill him if he asked any questions." *Id.* His experience in the ADMAX SHU

tracked that of other 9/11 detainees. For instance, "[w]henever Mehmood was removed from his cell, he was placed in handcuffs, chains, and shackles. Four or more MDC staff members typically escorted him to his destination, frequently inflicting unnecessary pain along the way, for example, by banging him into the wall, dragging him, carrying him, and stepping on his shackles and pushing his face into the wall." *Id.* ¶166. Neither the FBI nor INS interviewed Mehmood following his arrest. Mehmood was not released from the ADMAX SHU until February 6, 2002.

B. Ahmed Khalifa

Khalifa, who had completed five years toward a medical degree at the University of Alexandria in Egypt, came to the United States on a student visa in July 2001. He came to the FBI's attention after the FBI received a tip that "several Arabs who lived at Khalifa's address were renting a post-office box, and possibly sending out large quantities of money." *Id.* ¶195. On September 30, 2001, FBI, INS, and officers from the New York City Police Department came to the apartment Khalifa shared with several Egyptian friends. The officers searched his wallet and apparently became "very interested in a list of phone numbers of friends in Egypt." *Id.* ¶196. After searching the apartment, the agents asked Khalifa for his passport and "if he had anything to do with September 11." *Id.* ¶197. One FBI agent told Khalifa that they were only interested in three of his roommates, but another agent said they also needed Khalifa, whom they arrested for "working without authorization." *Id.*

On October 1, 2001, after briefly stopping at a local INS detention facility to complete paperwork, Khalifa and his roommates were transported to the MDC. When he arrived at the MDC, Khalifa "was slammed into the

wall, pushed and kicked by MDC officers and placed into a wet cell, with a mattress on the floor." *Id.* ¶201. "[His] wrists were cut and bruised from his handcuffs, and he was worried about other detainees, whom he heard gasping and moaning through the walls of his cell." *Id.*

FBI and INS agents interviewed Khalifa on October 7, 2001. One of the agents apologized to Khalifa after noticing the bruises on his wrists. When Khalifa stated that MDC guards were abusing him, the agents "stated it was because he was Muslim." *Id.* ¶202. In notes from the interview, the agents did not question Khalifa's credibility, and noted no suspicion of ties to terrorism or interest in him in connection with PENTTBOM.

Following the interview, MDC guards strip searched Khalifa and "laughed when they made him bend over and spread his buttocks." *Id.* ¶203. Khalifa complains of the conditions associated with detention in the ADMAX SHU, including arbitrary and abusive strip searches, sleep deprivation, constructive denial of recreational activities and hygiene items, and deprivation of food and medical attention.

By November 5, 2001, the New York FBI field office affirmatively cleared Khalifa of any ties to terrorism and sent his name to FBI Headquarters for final clearance. Khalifa was not officially cleared until December 19, 2001. He remained confined in the ADMAX SHU until mid-January 2002.

C. Purna Raj Bajracharya

Bajracharya is neither Muslim nor Arab. He is a Buddhist and native of Nepal who entered the United States on a three-month business visa in 1996. After overstaying his visa, Bajracharya remained in Queens, New York, for five years, working various odd jobs to send money home to his wife and sons in Nepal. Having

planned to return home in the fall or winter of 2001, Bajracharya used a video camera to capture the streets he had come to know in New York. He came to the FBI's attention on October 25, 2001, when a Queens County District Attorney's Office employee "observed an '[A]rab male' videotaping outside a Queens[ ] office building that contained the Queens County District Attorney['s] Office and a New York FBI office." *Id.* ¶230. When approached by investigators from the District Attorney's Office, Bajracharya tried to explain that he was a tourist. The investigators took him inside the building and interrogated him for five hours. FBI and INS agents arrived at some point during the interrogation. Bajracharya subsequently took the agents to his apartment; provided them with his identification documents, which established his country of origin; and admitted to overstaying his visa.

Apparently due to the videotaping, Bajracharya was designated as being of "special interest" to the FBI and on October 27, 2001, he was transported to the MDC. *Id.* ¶¶233-34. On October 30, 2001, the FBI agent assigned to Bajracharya's case, along with other law enforcement personnel, interviewed him with the aid of an interpreter. During the interview, "Bajracharya was asked whether he was Muslim or knew any Muslims." *Id.* ¶235. Bajracharya explained that he was not Muslim and knew no Muslims. The FBI agent's notes from the interview do not question Bajracharya's credibility or express any suspicion of ties to terrorism. Two days later, the same agent affirmatively cleared Bajracharya of any link to terrorism. By November 5, 2001, the New York FBI field office completed its investigation and forwarded Bajracharya's case to FBI Headquarters for final clearance. Documents at FBI Headquarters note that

the FBI had no interest in Bajracharya by mid-November 2001. Nonetheless, he was not released from the ADMAX SHU until January 13, 2002. The FBI agent assigned to Bajracharya's case did not understand why Bajracharya remained in the ADMAX SHU throughout this period; the agent eventually called the Legal Aid Society and advised an attorney that Bajracharya needed legal representation.

Bajracharya, who is 5'3" and weighed about 130 pounds at the time of his arrest, complains of the same conditions common to the other MDC Plaintiffs. For instance, he could not sleep due to the light in his cell, and when he was removed from his cell, he would be placed in handcuffs, chains, and shackles and escorted by four or more MDC staff members. Bajracharya became so traumatized by his experience in the ADMAX SHU that he wept constantly. When an attorney requested that the MDC transfer Bajracharya to general population, an MDC "doctor responded that Bajracharya was crying too much, and would cause a riot." *Id.* ¶241.

IV. The New York List And The "Of Interest" Designation

As originally articulated by Ashcroft, following 9/11, the DOJ sought to prevent future terrorism by arresting and detaining those people who "have been identified as persons who participate in, or lend support to, terrorist activities." OIG Report at 12 (internal quotation marks omitted). To that end, Michael Pearson, who was then INS Executive Associate Commissioner for Field Operations, issued a series of Operational Orders, which addressed the responsibilities of INS agents operating with the FBI to investigate leads on illegal aliens. A September 22, 2001 order instructed agents to "exercise sound judgment" and to limit arrests to those aliens in whom

the FBI had an "interest" and discouraged arrest in cases that were "clearly of no interest in furthering the investigation of the terrorist attacks of September 11th." *Id.* at 45 (internal quotation marks omitted). The "of interest" designation by an FBI agent had significant implications for a detainee. "Of interest" detainees were placed on the INS List, subject to the hold-until-cleared policy, and required FBI clearance of any connection to terrorism before they could be released or removed from the United States. Detainees who were not designated "of interest" to the FBI's PENTTBOM investigation were not placed on the INS List, did not require clearance by the FBI, and could be processed according to normal INS procedures. *Id.* at 40.

The arrest and detention mandate was not uniformly implemented throughout the country. Specifically, the New York FBI investigated all PENTTBOM leads without vetting the initial tip and designated as "of interest" "anyone picked up on a PENTTBOM lead . . . regardless of the strength of the evidence or the origin of the lead." *Id.* at 41; see also Compl. ¶¶ 43-45. For instance, days after 9/11, New York City police stopped three Middle Eastern men in Manhattan on a traffic violation and found plans to a public school in the car. The next day, their employer confirmed that the men had the plans because they were performing construction work on the school. Nonetheless, the men were arrested and detained. See OIG Report at 42. In another instance, a Middle Eastern man was arrested for illegally crossing into the United States from Canada over a week before 9/11. After the attacks, the man was placed on New York's "'special interest' list even though a document in his file, dated September 26, 2001, stated that FBI New

York had no knowledge of the basis for his detention." *Id.* at 64 (internal quotation marks omitted).

In many cases, the New York FBI did not even attempt to determine whether the alien was linked to terrorism, see *id.* at 14, 16, 41-42, 47, and it "never labeled a detainee 'no interest' until after the clearance process was complete," *id.* at 18 (emphasis added). Thus, aliens encountered and arrested pursuant to a PENTTBOM lead in New York were designated "of interest" (or special interest) and held until the local field office confirmed they had no ties to terrorism. *Id.* at 14; see also *id.* at 53.[11] The result was that the MDC Plaintiffs and others similarly situated in New York were held at the MDC ADMAX SHU as if they met the national "of interest" designation. These practices—specifically the absolute lack of triage—appear to have been unique to New York. See *id.* at 47, 56.[12]

At some point in October 2001, INS representatives to the SIOC Working Group learned that the New York FBI was maintaining a separate list (the "New York List") of detainees who had not been included in the national INS List. One explanation for maintaining a separate New York List was that the New York FBI could not determine if the detainees had any connection with terrorist activity. *Id.* at 54.

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[11] The OIG Report indicates that 491 of the 762 detainees were arrested in New York. OIG Report at 21-22. However, the OIG Report does not identify how many New York arrests were the result of the New York FBI's efforts.

[12] The OIG Report posits that the New York response differed from the rest of the nation, at least in part, as a result of the New York FBI and U.S. Attorney's Office's long tradition of independence from their headquarters in Washington, D.C. See OIG Report at 54.

After INS Headquarters learned of the separate New York List, small groups of senior officials from the DAG's Office, the FBI, and the INS convened on at least two occasions in October and November 2001 to suggest how to deal with the two separate lists of detainees. In discussing how to address the New York List, "officials at the INS, FBI, and [DOJ] raised concerns about, among other things, whether the aliens [on the New York List] had any nexus to terrorism." *Id.* at 53. Nonetheless, this list was merged with the INS List due to the concern that absent further investigation, "the FBI could unwittingly permit a dangerous individual to leave the United States." *Id.* The decision to merge the lists ensured that some of the individuals on the New York List would remain detained in the challenged conditions of confinement as if there were some suspicion that those individuals were tied to terrorism, even though no such suspicion existed.

V. The Issues On Appeal

In a January 15, 2013 Memorandum and Order, the district court granted in part and denied in part Defendants' motions to dismiss the Complaint. The district court dismissed all claims against the DOJ Defendants. As to the MDC Defendants, the district court denied their motions to dismiss Plaintiffs' substantive due process conditions of confinement claim (Claim 1); equal protection conditions of confinement claim (Claim 2); free exercise claim (Claim 3); unreasonable strip search claim (Claim 6); and conspiracy claim under 42 U.S.C. § 1985(3) (Claim 7). See *Turkmen III*, 915 F. Supp. 2d at 324. The MDC Defendants appealed, and Plaintiffs cross-appealed the dismissal of the claims against the DOJ Defendants

based on a judgment that was entered pursuant to Rule 54(b) of the Federal Rules of Civil Procedure.[13]

DISCUSSION[14]

I. PLEADING STANDARD

To satisfy *Iqbal*'s plausibility standard, Plaintiffs must "plead[ ] factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." 556 U.S. at 678. Although plausibility is not a "probability requirement," Plaintiffs must allege facts that permit "more than a sheer possibility that a defendant has acted unlawfully." *Id.* (internal quotation marks omitted). Factual allegations that are "merely consistent with" unlawful conduct do not create a reasonable inference of liability. *Id.*

Moreover, "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Id.* Well-pleaded factual allegations, in contrast, should be presumed true, and we must determine "whether they plausibly give rise to an entitlement to relief." *Id.* at 679. Ultimately, every plausibility determination is a "context-specific task that requires the reviewing court to draw on its judicial experience and common sense." *Id.*

With the exception of the Section 1985 conspiracy claim, all of Plaintiffs' claims allege constitutional violations based on injuries first recognized by the Supreme Court in *Bivens*, 403 U.S. at 388. During the course of this litigation, the Supreme Court made it clear in *Iqbal*

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[13] Plaintiffs have not appealed the district court's dismissal of their interference with counsel claims (Claims 4 and 5).

[14] We review the district court's determination of Defendants' Rule 12(b)(6) motions to dismiss de novo. See *Papelino* v. *Albany Coll. of Pharmacy of Union Univ.*, 633 F.3d 81, 88 (2d Cir. 2011).

that a federal tortfeasor's *Bivens* liability cannot be premised on vicarious liability. 556 U.S. at 676. Thus, Plaintiffs must plausibly plead that each Defendant, "through the official's own individual actions," violated Plaintiffs' constitutional rights. *Id.* In other words, *Bivens* relief is available only against federal officials who are personally liable for the alleged constitutional tort. *Id.* at 676-77. *Iqbal* precludes relying on a supervisor's mere knowledge of a subordinate's mental state (*i.e.*, discriminatory or punitive intent) to infer that the supervisor shared that intent. *Id.* at 677. Knowing that a subordinate engaged in a rogue discriminatory or punitive act is not enough. But that is not to say that where the supervisor condones or ratifies a subordinate's discriminatory or punitive actions the supervisor is free of *Bivens*'s reach. See *id.* at 683.

II. Availability Of A *Bivens* Remedy For Plaintiffs' Claims

Unlike the MDC Defendants, none of the DOJ Defendants challenge the existence of a *Bivens* remedy in their briefs to this Court. While the DOJ Defendants did raise this issue below, and are represented by able counsel on appeal, they have chosen to not offer that argument now as a further defense of their victory in the district court. However, as the reader will later discover, our dissenting colleague makes much of this defense, raising it as her main objection to our resolution of the appeal. Given the MDC Defendants' arguments, as well as the dissent's decision to press the issue, legitimately noting that a district court's judgment can be affirmed on any ground supported by the record, Dissenting Op., *post* at 7 n.4 (citing *Lotes Co.* v. *Hon Hai Precision Indus. Co.*, 753 F.3d 395, 413 (2d Cir. 2014)), we think it appropriate to explain our conclusion that a *Bivens* remedy is

available for the MDC Plaintiffs' punitive conditions of confinement and strip search claims against both the DOJ and the MDC Defendants.

In *Bivens*, 403 U.S. at 388, the Supreme Court "recognized for the first time an implied private action for damages against federal officers alleged to have violated a citizen's constitutional rights." *Corr. Servs. Corp.* v. *Malesko*, 534 U.S. 61, 66 (2001). "The purpose of *Bivens* is to deter individual federal officers from committing constitutional violations." *Id.* at 70. Because a *Bivens* claim has judicial parentage, "the Supreme Court has warned that the *Bivens* remedy is an extraordinary thing that should rarely if ever be applied in new contexts." *Arar* v. *Ashcroft*, 585 F.3d 559, 571 (2d Cir. 2009) (en banc) (internal quotation marks omitted). Thus, a *Bivens* remedy is not available for all who allege injury from a federal officer's violation of their constitutional rights.

In *Arar*, we outlined a two-step process for determining whether a *Bivens* remedy is available. First, the court must determine whether the underlying claims extend *Bivens* into a "new context." *Id.* at 572. If, and only if, the answer to this first step is yes, the court must then consider (a) "whether there is an alternative remedial scheme available to the plaintiff," and, even if there is not, (b) "whether special factors counsel hesitation in creating a *Bivens* remedy." *Id.* (internal quotation marks and brackets omitted). As *Arar* noted, case law provides limited guidance regarding how to determine whether a claim presents a new context for *Bivens* purposes. Thus, "[w]e construe[d] the word 'context' as it is commonly used in law: to reflect a potentially recurring scenario that has similar legal and factual components." *Id.*

Determining the "context" of a claim can be tricky. The MDC Defendants contend that the context of Plain-

tiffs' claims is the nation's "response to an unprecedented terrorist attack." Sherman Br. 45. The DOJ Defendants made a similar argument before the district court in an earlier round of this litigation. See *Turkmen I*, 2006 WL 1662663, at *30. The MDC Defendants, and the dissent on behalf of the DOJ Defendants, contend that *Arar* supports this view. But if that were the case, then why did *Arar* take pains to note that the "context" of Arar's claims was not the nation's continuing response to terrorism, but the acts of federal officials in carrying out Arar's extraordinary rendition? 585 F.3d at 572. We looked to both the rights injured and the mechanism of the injury to determine the context of Arar's claims. In rejecting the availability of a *Bivens* remedy, we focused on the *mechanism* of his injury: extraordinary rendition—"a distinct phenomenon in international law"—and determined this presented a new context for *Bivens*-based claims. *Id.* Only upon concluding that extraordinary rendition presented a new context did we examine the policy concerns and competing remedial measures available to Arar. In our view, setting the context of the *Bivens* claims here as the national response in the wake of 9/11 conflates the two-step process dictated by this Court in *Arar*. The reasons why Plaintiffs were held at the MDC as if they were suspected of terrorism do not present the "context" of their confinement—just as the reason for Arar's extraordinary rendition did not present the context of his claim. Without doubt, 9/11 presented unrivaled challenges and severe exigencies—but that does not change the "context" of Plaintiffs' claims. "[M]ost of the rights that the Plaintiff[s] contend[ ] were violated do not vary with surrounding circumstances, such as the right not to be subjected to needlessly harsh conditions of confinement, the right to be free from the use of excessive force, and the right not to be subjected

to ethnic or religious discrimination. The strength of our system of constitutional rights derives from the steadfast protection of those rights in both normal and unusual times." *Iqbal* v. *Hasty* (*Hasty*), 490 F.3d 143, 159 (2d Cir. 2007), rev'd on other grounds sub nom. *Iqbal*, 556 U.S. 662.

Thus, we think it plain that the MDC Plaintiffs' conditions of confinement claims are set in the following context: federal detainee Plaintiffs, housed in a federal facility, allege that individual federal officers subjected them to punitive conditions. This context takes account of both the rights injured (here, substantive due process and equal protection rights)[15] and the mechanism of injury (punitive conditions without sufficient cause). The claim—that individual officers violated detainees' constitutional rights by subjecting them to harsh treatment with impermissible intent or without sufficient cause—stands firmly within a familiar *Bivens* context. Both the Supreme Court and this Circuit have recognized a *Bivens* remedy for constitutional challenges to conditions of confinement. In *Carlson* v. *Green*, 446 U.S. 14, 17-20 (1980),

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[15] The rights-injured component of Plaintiffs' claims fall within a recognized *Bivens* context. This Circuit has presumed the availability of a *Bivens* remedy for substantive due process claims in several cases. See *Arar*, 585 F.3d at 598 (Sack, J., dissenting) (citing cases). In addition, the Supreme Court has acknowledged the availability of "a *Bivens* action to redress a violation of the equal protection component of the Due Process Clause of the Fifth Amendment." *Iqbal*, 556 U.S. at 675 (citing *Davis* v. *Passman*, 442 U.S. 228 (1979)). And while it is true that the Supreme Court has subsequently declined to extend *Davis* to other employment discrimination claims, such as in *Chappell* v. *Wallace*, 462 U.S. 296, 300-04 (1983), the Court's analysis was focused on the special nature of the employer-employee relationship in the military—or, in other words, the mechanism of injury. Here, where the mechanism of injury is also familiar, a *Bivens* remedy is plainly available.

the Supreme Court recognized an implied remedy for the plaintiff's claim alleging an Eighth Amendment violation for prisoner mistreatment. Furthermore, in *Malesko*, in refusing to extend a *Bivens* remedy to claims against private corporations housing federal detainees, the Supreme Court observed in dicta that, while no claim was available against the *private corporation*, a federal prisoner would have a remedy against *federal officials* for constitutional claims. 534 U.S. at 72. "If a federal prisoner in a BOP facility alleges a constitutional deprivation, he may bring a *Bivens* claim against the offending individual officer, subject to the defense of qualified immunity." *Id.* The Court went on to recognize that the "prisoner may not bring a *Bivens* claim against the officer's employer, the United States, or the BOP." *Id.* The MDC Plaintiffs' claims here plainly follow *Malesko*'s guidance: the claims are raised against the individual officers, both at the DOJ and the MDC, who were responsible for subjecting the Plaintiffs to punitive conditions of confinement.

The Second Circuit has also recognized the availability of *Bivens* relief for federal prisoners housed in federal facilities bringing claims against individual federal officers. In *Thomas* v. *Ashcroft*, 470 F.3d 491, 497 (2d Cir. 2006), this Court reversed the district court's dismissal of the prisoner plaintiff's *Bivens* claim for violation of his due process rights against supervisory prison officials. See also *Tellier* v. *Fields*, 280 F.3d 69, 80-83 (2d Cir. 2000) (recognizing a *Bivens* remedy for a claim of deprivation of procedural due process brought by a federal prisoner against federal prison officials). Furthermore, in *Hasty*, where we considered claims nearly identical to those at issue in this case, we "did not so much as hint either that a *Bivens* remedy was unavailable or that its availability would constitute an unwarranted extension of

the *Bivens* doctrine." *Arar*, 585 F.3d at 597 (Sack, J., dissenting) (discussing *Hasty*, 490 F.3d at 177-78).

Our sister circuits have also permitted *Bivens* claims for unconstitutional conditions of confinement. In *Cale* v. *Johnson*, 861 F.2d 943, 947 (6th Cir. 1988), abrogated on other grounds by *Thaddeus-X* v. *Blatter*, 175 F.3d 378 (6th Cir. 1999) (en banc), the Sixth Circuit held that "federal courts have the jurisdictional authority to entertain a *Bivens* action brought by a federal prisoner, alleging violations of his right to substantive due process." The Third Circuit has also permitted a federal inmate to bring a civil rights action against prison officials. See *Bistrian* v. *Levi*, 696 F.3d 352, 372-75 (3d Cir. 2012) (assuming availability of a *Bivens* remedy for plaintiff's Fifth Amendment substantive due process and other constitutional claims challenging his conditions of confinement).

Notwithstanding the persuasive precedent suggesting the availability of a *Bivens* remedy for the MDC Plaintiffs' conditions of confinement claims, the MDC Defendants, and our dissenting colleague, argue that the MDC Plaintiffs' claims present a new *Bivens* context because the Plaintiffs are illegal aliens. But because the MDC Plaintiffs' right to be free from punitive conditions of confinement is coextensive with that of a citizen, their unlawful presence in the United States at the time of the challenged confinement does not place their standard mistreatment claim into a new context. Indeed, the Fifth Circuit has recognized a *Bivens* claim raised by a Mexican national for violations of her Fourth and Fifth Amendment rights to be free from false imprisonment and the use of excessive force by law enforcement personnel. See *Martinez-Aguero* v. *Gonzalez*, 459 F.3d 618, 625 (5th Cir. 2006). The Ninth Circuit has also recog-

nized a *Bivens* claim for due process violations that occurred during an illegal alien plaintiff's detention. See *Papa* v. *United States*, 281 F.3d 1004, 1010-11 (9th Cir. 2002).[16] Thus, we conclude that a *Bivens* remedy is available for the Plaintiffs' substantive due process and equal protection conditions of confinement claims.

Our understanding of *Bivens* and this Court's decision in *Arar* do not however suggest the availability of a *Bivens* remedy for the Plaintiffs' free exercise claim. That claim—that Defendants deliberately interfered with Plaintiffs' religious practices by: (1) denying them timely access to copies of the Koran; (2) denying them Halal food; and (3) failing to stop MDC staff from interfering with Plaintiffs' prayers—does not fall within a familiar *Bivens* context. Here, it is the right injured—Plaintiffs' free exercise right—and not the mechanism of injury that places Plaintiffs' claims in a new *Bivens* context. Indeed, the Supreme Court has "not found an implied damages remedy under the Free Exercise Clause" and has "declined to extend *Bivens* to a claim sounding in the First Amendment." *Iqbal*, 556 U.S. at 675 (citing *Bush* v. *Lucas*, 462 U.S. 367 (1983)). Accordingly, we agree with the MDC Defendants that Plaintiffs' free exercise claim should have been dismissed.

But the MDC Plaintiffs' claim that they were subjected to unlawful strip searches falls within an established *Bivens* context: federal detainee plaintiffs, housed in a

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[16] We note that the Ninth Circuit has declined to provide illegal aliens with an implied *Bivens* remedy for *unlawful detention* during deportation proceedings. *Mirmehdi* v. *United States*, 689 F.3d 975, 981-83 (9th Cir. 2012). Of course, that decision is plainly inapposite here where the MDC Plaintiffs do not challenge the fact that they were detained, but rather the conditions in which they were detained.

federal facility, allege that individual federal officers subjected them to unreasonable searches in violation of the Fourth Amendment. The MDC Defendants fail to persuasively explain why recognizing the MDC Plaintiffs' unlawful strip search claim would extend *Bivens* to a new context. Indeed, the right violated certainly falls within a recognized *Bivens* context: the Fourth Amendment is at the core of the *Bivens* jurisprudence, as *Bivens* itself concerned a Fourth Amendment claim. In *Bivens*, the plaintiff brought a Fourth Amendment claim for the defendants' use of unreasonable force without probable cause, resulting in the plaintiff's unlawful arrest. 403 U.S. at 389-90; see also *Groh* v. *Ramirez*, 540 U.S. 551, 555 (2004) (recognizing the availability of a *Bivens* remedy for a Fourth Amendment claim of an unreasonable search, as a result of a facially invalid warrant). This Circuit has also permitted *Bivens* relief for Fourth Amendment claims involving unreasonable searches. See, *e.g.*, *Castro* v. *United States*, 34 F.3d 106, 107 (2d Cir. 1994). And the mechanism of the violation—here, an unreasonable search performed by a prison official—has also been recognized by this Circuit. Indeed, in *Arar*, we stated that "[i]n the small number of contexts in which courts have implied a *Bivens* remedy, it has often been easy to identify both the line between constitutional and unconstitutional conduct, and the alternative course which officers should have pursued .... [T]he immigration officer who subjected an alien to multiple strip searches without cause should have left the alien in his clothes." 585 F.3d at 580; see also *Hasty*, 490 F.3d at 170-73 (assuming the existence of a *Bivens* remedy to challenge strip searches under the Fourth Amendment).

Accordingly, we conclude that a *Bivens* remedy is available for Plaintiffs' conditions of confinement claims,

under both the Due Process and Equal Protection Clauses of the Fifth Amendment, and Fourth Amendment unreasonable and punitive strip searches claim.[17] However, Plaintiffs' free exercise claim would require extending *Bivens* to a new context, a move we decline to make absent guidance from the Supreme Court.

III. Claim 1: Substantive Due Process Conditions Of Confinement

The MDC Plaintiffs allege that the harsh conditions of confinement in the MDC violated their Fifth Amendment substantive due process rights and that all Defendants are liable for this harm.[18] Plaintiffs present distinct theories of liability as to the DOJ and MDC Defendants.

A. Applicable Legal Standard

The Fifth Amendment's Due Process Clause forbids subjecting pretrial detainees to punitive restrictions or conditions. See *Bell* v. *Wolfish* (*Wolfish*), 441 U.S. 520, 535 & n.16 (1979).[19] Plaintiffs must plausibly plead that Defendants, (1) with punitive intent, (2) personally engaged in conduct that caused the challenged conditions of

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[17] Because we conclude that Plaintiffs' substantive due process, equal protection, and unreasonable punitive strip searches claims do not extend *Bivens* to a new context, we need not address "whether there is an alternative remedial scheme available to the plaintiff" or "whether special factors counsel hesitation in creating a *Bivens* remedy." *Arar*, 585 F.3d at 572 (internal quotation marks and brackets omitted).

[18] Turkmen and Sachdeva, the Passaic Plaintiffs, do not bring a substantive due process conditions of confinement claim or unreasonable strip search claim (Claims 1 and 6).

[19] The parties have not argued for a different standard in this appeal. Accordingly, we do not address whether the rights of civil immigration detainees should be governed by a standard that is even more protective than the standard that applies to pretrial criminal detainees.

confinement. See *id.* at 538; see also *Iqbal*, 556 U.S. at 676-77. Absent "an expressed intent to punish," *Wolfish*, 441 U.S. at 538, we may only infer that Defendants acted with punitive intent if the challenged conditions were "not reasonably related to a legitimate goal—if [they were] arbitrary or purposeless," *id.* at 539.

B. The DOJ Defendants

While the DOJ Defendants do not raise a no-*Bivens*-claim defense, they do forcefully contest liability here with powerful post-*Iqbal* assertions that "the former Attorney General and FBI Director did not themselves require or specify any of the particular conditions set forth in the complaint. And they cannot be held liable on what amounts to a theory of *respondeat superior* for the actions of others who may have imposed those conditions." Ashcroft & Mueller Br. 10. They contend that because the former Attorney General's initial detention order was constitutional, having been approved by the Supreme Court in *Iqbal*, the DOJ Defendants were "entitled to presume that the facially constitutional policy would in turn be implemented lawfully . . . ." *Id.* at 9. We agree . . . to a point.

The MDC Plaintiffs concede that the DOJ Defendants did not create the particular conditions in question. See *Turkmen III*, 915 F. Supp. 2d at 326 n.4; see also OIG Report at 19, 112-13 (reporting that, at least initially, BOP officials determined the conditions under which detainees would be held, without direction from the FBI or elsewhere). The MDC Plaintiffs similarly fail to plead that Ashcroft's initial arrest and detention mandate required subordinates to apply excessively restrictive conditions to civil detainees against whom the government lacked individualized suspicion of terrorism. Given the mandate's facial validity, the DOJ Defendants had a right

to presume that subordinates would carry it out in a constitutional manner. See *Al-Jundi v. Estate of Rockefeller*, 885 F.2d 1060, 1065-66 (2d Cir. 1989). But that is not the end of the matter.

The MDC Plaintiffs plausibly plead that the DOJ Defendants were aware that illegal aliens were being detained in punitive conditions of confinement in New York and further knew that there was no suggestion that those detainees were tied to terrorism except for the fact that they were, or were perceived to be, Arab or Muslim.[20] The MDC Plaintiffs further allege that while knowing these facts, the DOJ Defendants were responsible for a decision to merge the New York List with the national INS List, which contained the names of detainees whose detention was dependent not only on their illegal immigrant status and their perceived Arab or Muslim affiliation, but also a suspicion that they were connected to terrorist activities. The merger ensured that the MDC

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[20] The dissent counters that "[t]his is not apparent in the record," citing Plaintiff Bajracharya's videotaping of a building in Queens as evidence of that Plaintiff's possible tie to terrorism. Dissenting Op., *post* at 43 n.28. The dissent makes no mention, of course, of Plaintiff Khalifa, who was told that the FBI was only interested in his roommates, but who was arrested and then detained in the ADMAX SHU anyway, Compl. ¶ 197; or of Plaintiff Mehmood, who was arrested and detained in the ADMAX SHU in place of his wife, in whom the FBI had apparently expressed interest, but who was still breastfeeding their son, *id.* ¶ 159. The dissent further claims that detainees were not sent to the ADMAX SHU based on their perceived race or religion, but—as the OIG Report states—based on whether they were designated of "high interest" to the PENTTBOM investigation. Dissenting Op., *post* at 44 n.28 (citing OIG Report at 18, 111). But, as the dissent concedes, *id.*, Plaintiffs' well-pleaded Complaint specifically contradicts this point: the MDC Plaintiffs were detained in the ADMAX SHU "even though they had not been classified 'high interest,'" Compl. ¶ 4.

Plaintiffs would continue to be confined in punitive conditions. This is sufficient to plead a Fifth Amendment substantive due process violation.[21] Given the lack of individualized suspicion, the decision to merge the lists was not "reasonably related to a legitimate goal." See *Wolfish*, 441 U.S. at 539. The only reason why the MDC Plaintiffs were held as if they were suspected of terrorism was because they were, or appeared to be, Arab or Muslim. We conclude that this plausibly pleads punitive intent. *Id.*

1. *Punitive Conditions of Confinement*

Contrary to the district court's conclusion that Plaintiffs failed to "allege that the DOJ [D]efendants were even aware of [the] conditions," *Turkmen III*, 915 F. Supp. 2d at 340, the Complaint and the OIG Report each contain allegations of the DOJ Defendants' knowledge of the challenged conditions. Plaintiffs allege, *inter alia*, that Mueller ran the 9/11 investigation out of FBI Headquarters; and that "Ashcroft, Mueller[,] and Ziglar received detailed daily reports of the arrests and detentions," Compl. ¶47; see also *id.* ¶¶63-65.

The OIG Report makes plain the plausibility of Plaintiffs' allegations. The "[DOJ] was aware of the BOP's decision to house the September 11 detainees in

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[21] We acknowledge, as the dissent points out, that the MDC Plaintiffs did not advance the "lists-merger theory" before this Court or the district court. Dissenting Op., *post* at 43 n.28. Rather, they structured the Complaint to challenge Ashcroft's arrest and detention mandate as initially formulated and generally applied. In examining the Complaint's sufficiency, we have been clear that the pleadings are inadequate to challenge the validity of the policy *ab initio*, but do state a claim with regard to the merger decision, an event that Plaintiffs explicitly reference in the Complaint. See Compl. ¶47; Pls.' Br. 38. Sufficiency analysis requires a careful parsing of the Complaint and that is all that has occurred here.

high-security sections in various BOP facilities." OIG Report at 19. The Deputy Chief of Staff to Ashcroft told the OIG that an allegation of mistreatment was called to the Attorney General's attention. *Id.* at 20. And BOP Director Kathy Hawk Sawyer stated that in the weeks following 9/11, the Deputy Attorney General's Chief of Staff and the Principal Associate Deputy Attorney General "called her . . . with concerns about detainees' ability to communicate both with those outside the facility and with other inmates," *id.* at 112, which she said confirmed for her that the decision to house detainees in the restrictive conditions of the ADMAX SHU was appropriate, *id.* at 112-113. This supports the reasonable inference that not only was Ashcroft's office aware of some of the conditions imposed, but affirmatively supported them. See also *id.* at 113 (DOJ officials told Sawyer to "take [BOP] policies to their legal limit").[22] Furthermore, the OIG Report also makes clear that conditions in the ADMAX SHU began to receive media attention soon after detentions began, see *id.* at 2, 5;[23] thus, it seems implausible

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[22] The dissent attempts to minimize the force of these comments, claiming that communications about a condition of confinement that was lifted before the merger decision cannot support an inference as to what the DOJ Defendants knew about the conditions in the ADMAX SHU. Dissenting Op., *post* at 56-57. Simply put, we disagree. The fact remains that a condition of confinement, less severe and abusive than the conditions at issue here, garnered the attention of senior officials; it stands to reason that conditions that kept detainees in their cells for twenty-three hours a day, denied them sleep by bright lights, and involved excessive strip searches and physical abuse, would have come to the DOJ Defendants' attention.

[23] See, *e.g.*, Neil A. Lewis, *A Nation Challenged: The Detainees; Detentions After Attacks Pass 1,000, U.S. Says*, N.Y. TIMES, Oct. 30, 2001, available at http://www.nytimes.com/2001/10/30/us/a-nation-challenged-the-detainees-detentionsafter-attacks-pass-1000-us-says

that the public's concerns did not reach the DOJ Defendants' desks.

Of course, we cannot say for certain that daily reports given to Ashcroft and Mueller detailed the conditions at the ADMAX SHU or that the daily meetings of the SIOC Working Group (containing representatives from each of the DOJ Defendants' offices) discussed those conditions. But on review of a motion to dismiss, Plaintiffs need not *prove* their allegations; they must *plausibly plead* them. At a minimum, a steady stream of information regarding the challenged conditions flowed between the BOP and senior DOJ officials. Given the MDC Plaintiffs' allegations, the media coverage of conditions at the MDC, and the DOJ Defendants' announced central roles in PENTTBOM, it seems to us plausible that information concerning conditions at the MDC, which held eighty-four of the 9/11 detainees, reached the DOJ Defendants.[24]

.html (citing "common news reports of abuse involv[ing] mistreatment of prisoners of Middle Eastern background at jails").

[24] Furthermore, the OIG reports were issued pursuant to the Office of the Inspector General's responsibilities under the USA PATRIOT Act, which was enacted on October 26, 2001. See OIG Report at 3 n.6. The PATRIOT Act, Section 1001, reads: "The Inspector General of the Department of Justice shall designate one official who shall—(1) review information and receive complaints alleging abuses of civil rights and civil liberties by employees and officials of the Department of Justice." PATRIOT Act, Pub. L. No. 107-56, § 1001, 115 Stat. 272 (2001). "On October 30, 2001, the OIG reviewed a newspaper article in which a September 11 detainee alleged he was physically abused when he arrived at the MDC on October 4, 2001. Based on the allegations in the article, the OIG's Investigations Division initiated an investigation into the matter." OIG Report at 144. It seems to us most plausible that if the OIG—who is "under the authority, direction, and control of the Attorney General with respect to audits or investigations," 5 U.S.C. App. 3 § 8E(a)(1)—was aware of the challenged conditions at the MDC, the DOJ Defendants were as well.

2. Lack of Individualized Suspicion

The MDC Plaintiffs also plausibly plead that the DOJ Defendants were aware that the FBI had not developed any connection between some of the detainees and terrorist activities. The Complaint and OIG Report both make clear that the New York FBI arrested all "out-of-status" aliens encountered—even coincidentally—in the course of investigating a PENTTBOM lead. OIG Report at 41-42, 69-70. These arrestees were "deemed 'of interest' for purposes of the 'hold until cleared' policy, regardless of the strength of the evidence or the origin of the lead." *Id.* at 41. Those deemed of "high interest" were sent to the MDC's ADMAX SHU, *id.* at 111, but "there was little consistency or precision to the process that resulted in detainees being labeled 'high interest,'" *id.* at 158.[25]

Even if the DOJ Defendants were not initially aware of this practice, the Complaint and OIG reports support the reasonable inference that Ashcroft and Mueller learned of it within weeks of 9/11. The Complaint clearly alleges that the DOJ Defendants agreed that individuals for whom the FBI could only articulate an immigration law violation as a reason for detention—and for whom the FBI had not developed any reliable tie to terrorism—would continue to be treated as if the FBI had reason to believe the detainees had ties to terrorist activity. Compl. ¶67. Plaintiffs point to the detailed daily reports

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[25] Even some detainees who were not labeled "high interest" were nonetheless sent to the MDC's ADMAX SHU. For example, "Abbasi, Bajracharya, Mehmood, and Khalifa[ ] were placed in the ADMAX SHU even though they had not been classified 'high interest' and despite the absence of any information indicating they were dangerous or involved in terrorism, or any other legitimate reason for such treatment." Compl. ¶4.

that the DOJ Defendants received regarding arrests and detentions and allege that the DOJ Defendants "were aware that the FBI had no information tying Plaintiffs and class members to terrorism prior to treating them as 'of interest' to the PENTTBOM investigation." *Id.* ¶47. Indeed, they claim that Ashcroft, in particular, "insisted on regular, detailed reporting on arrests"; they allege that he received a daily "Attorney General's Report" on persons arrested. *Id.* ¶63. They further allege that it was Ziglar who was ultimately responsible for providing much of this information—which he gleaned from his twice daily briefings with his staff regarding the 9/11 detentions—to Ashcroft, indicating that he too was aware of the lack of individualized suspicion. *Id.* ¶64.

Once again, the OIG reports also support the MDC Plaintiffs' allegation that the DOJ Defendants became aware of the lack of individualized suspicion for some detainees held in the challenged conditions of confinement. The OIG Report states that "[a] variety of INS, FBI, and [DOJ] officials who worked on the[ ] September 11 detainee cases told the OIG that it soon became evident that many of the people arrested during the PENTTBOM investigation might not have a nexus to terrorism." OIG Report at 45. Other DOJ officials also stated that it "soon became clear" that only some of the detainees were of "genuine investigative interest"—as opposed to aliens identified by the FBI as "of interest" for whom the FBI had no suspicion of a connection to the attacks or terrorism in general. *Id.* at 47.

The OIG Report supports the reasonable inference that this information, known by other DOJ officials, came to the attention of the DOJ Defendants. In particular, the OIG Report specifies that Ashcroft and Mueller were involved in a "'continuous meeting' for the first few

months" after 9/11, at which "the issue of holding aliens until they were cleared was discussed." *Id.* at 39-40. Furthermore, the OIG Report makes clear that the SIOC Working Group, containing representatives from the offices of each of the DOJ Defendants, was aware of the lack of evidence tying detainees to terrorism. *Id.* at 53-57. As we have already noted, the OIG Report details how at some point in October 2001, the SIOC Working Group learned about the New York List and that "officials at the INS, FBI, and [DOJ] raised concerns about, among other things, whether the aliens had any nexus to terrorism." *Id.* at 53. Clearly this created a major problem for the DOJ. The existence of the New York List suddenly presented the possibility of more than doubling the number of detainees subject to the hold-until-cleared policy.[26] It seems quite *plausible* that DOJ officials would confer with the Attorney General and the Director of the FBI (it was, after all, his agents who were arresting out-of-status Arab and Muslim aliens and holding them as if they were "of interest" without any suspicion of terrorist connections) about the problem of the New York List and the hundreds of detainees picked up in contravention of Ashcroft's stated policy. Indeed, it seems to us *implausible* they did not. Finally, the OIG Report once again makes clear that media reports regarding allegations of mistreatment of detainees alleged that detainees remained in detention even though they had no involvement in terrorism. *Id.* at 2, 5.

3. *The Decision to Merge the Lists*

Plaintiffs plausibly plead that, despite the DOJ Defendants' knowledge of the conditions at the ADMAX

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[26] In October and November of 2001, the New York List contained approximately 300 detainees while the INS List for the rest of the nation contained only 200 detainees. OIG Report at 54.

SHU and the lack of any form of verified suspicion for a large number of those detainees on the New York List, Ashcroft approved, or at least endorsed, a decision to merge the New York List. The MDC Plaintiffs contend that he did so notwithstanding vocal opposition from various internal sources. The Complaint clearly alleges that "[a]gainst significant internal criticism from INS agents and other federal employees involved in the sweeps, Ashcroft ordered that, despite a complete lack of any information or a statement of FBI interest, all such Plaintiffs and class members [on the New York List] be detained until cleared and otherwise treated as 'of interest.'" Compl. ¶47. By taking this action, Ashcroft ensured that some of the individuals on the New York List would be placed in, or remain detained in, the challenged conditions of confinement.

Our dissenting colleague levels a concern as to the import of the merger of the lists and counters that nothing in the OIG reports confirms Ashcroft's personal knowledge of the correlation between the merger of the lists and the lack of individualized suspicion as to the MDC Plaintiffs. The dissent contends that, because Plaintiffs' allegations are not based on personal knowledge, there is no factual basis in the record for them. Dissenting Op., *post* at 45. True enough that Ashcroft did not acknowledge that he was aware of the merger of the lists and its implication for the MDC Plaintiffs, nor did he take responsibility for it. But then again a review of the OIG Report gives no indication that anybody asked him.

The absence of an inquiry to the former Attorney General is not a criticism of the Office of the Inspector General's methods, but a simple recognition of a fact that points out a key difference between our view of the OIG

reports and that of the dissent. For us, the OIG reports provide context for the allegations of the Complaint. See *supra* note 6. However, it would be a mistake to think of the OIG reports as a repository of all relevant facts of that troubled time; but that is exactly what the dissent seems inclined to do. The dissent measures plausibility by the absence or presence of fact-findings in the OIG reports. Thus, for the dissent, the fact that the Attorney General may not have been questioned is confirmation that he knew nothing. The reports make no such assertion.

It may be that following discovery it will be clear that Ashcroft was not responsible for the merger decision (nor was Mueller or Ziglar), but that is not the question at the pleading stage. The question is whether the MDC Plaintiffs plausibly plead that Ashcroft was responsible. Given the importance of the merger and its implications for how his lawful original order was being carried out, we think the MDC Plaintiffs plausibly allege that he was.

Indeed, the OIG Report supports the MDC Plaintiffs' allegation that Ashcroft was responsible for the merger decision. An incident at one of the New York List meetings provides additional context that supports that allegation. At the November 2, 2001 meeting, the group discussed the necessity of CIA checks, often a prerequisite to a 9/11 detainee's release from detention. OIG Report at 55. In response, Stuart Levey, the Associate Deputy Attorney General responsible for oversight of immigration issues, stated that he had to "check" before communicating a decision on whether "any detainees could be released without the CIA check." *Id.* at 56. This response could reasonably indicate (a) a lack of authority to respond to the question, or (b) that Levey wanted to consider other views before making the decision. Because

either is plausible, it is irrelevant that only inference (a) supports the conclusion that Levey could not answer the question on his own and had to take it to more senior officials.[27]

Furthermore, in late November 2001, when the INS Chief of Staff approached Levey about the CIA check policy, Levey said that he "did not feel comfortable making the decision about [the] request to change the CIA check policy without additional input." *Id.* at 62. It seems to us that if Levey was not comfortable changing the CIA check policy without input from more senior officials, he certainly would not have been comfortable making the decision on his own to double the number of detainees subject to that policy in the first instance.[28]

The dissent argues that the OIG Report forecloses the plausibility of the allegation that Levey brought the list-

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[27] The OIG Report states that Levey specifically consulted David Laufman, the Deputy Attorney General's Chief of Staff. OIG Report at 62. The dissent takes this as definitive proof that Ashcroft was not consulted on this, or the merger, decision. Dissenting Op., *post* at 47-49. The dissent mischaracterizes our reference to the CIA checks decision. We do not contend that Levey consulted Ashcroft about that decision, nor do we need to. In our view, the fact that Levey spoke to Laufman about that decision is not the end of the matter; indeed, the only relevance of the CIA checks decision, period, is that Levey was not capable of making it on his own, suggesting that he also would not be able to make the list-merger decision on his own.

[28] Indeed, Ziglar told the OIG that he contacted Ashcroft's office on November 7, 2001, to discuss concerns about the process of clearing names from the INS Custody List, especially the impact that merging the lists would have on that process and said that "based on these and other contacts with senior Department officials, he believed the Department was fully aware" of the INS's concerns. OIG Report at 66-67. This also suggests that Levey had communicated those concerns to Ashcroft, who nonetheless made the decision to merge the lists.

merger decision to Ashcroft because "Levey made the lists-merger decision '[a]t the conclusion of the [November 2] meeting' at which the subject was first raised to him." Dissenting Op., *post* at 49 (quoting OIG Report at 56). But the OIG Report does *not* indicate that the merger issue was first raised to Levey at the November 2 meeting. Rather, the OIG Report makes clear that the issue of the New York List was discovered in October 2001,[29] and that the decision to merge the lists was communicated at the November 2 meeting. Thus, surely it is plausible that Levey consulted with more senior officials, including Ashcroft, *prior* to that meeting.[30] Of course, discovery may show that Levey was solely responsible for the decision. But, again, the question is whether Plaintiffs' allegations support the inference that the decision was Ashcroft's; they do.

The MDC Plaintiffs' allegations against Mueller and Ziglar are also sufficient. The Complaint alleges, *inter*

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[29] While the dissent's observation that Levey did not attend the October 22, 2001 meeting during which the "problems presented by the New York List" were discussed is accurate, it is also irrelevant. See Dissenting Op., *post* at 49-50 (quoting OIG Report at 55). We do not contend that Levey learned about the New York List at the October 22 meeting, but simply that he learned about it *before* the November 2 meeting, giving him time to consult with more senior officials, including Ashcroft, before communicating a decision at that November meeting. Indeed, one would think that Levey would not attend the November 2 meeting without knowing its agenda.

[30] The dissent challenges the sufficiency of Plaintiffs' allegations and our reading of them as "wholly speculative." Dissenting Op., *post* at 48. Of course, Plaintiffs have no way of knowing what Levey and Ashcroft discussed; nor do we. *Iqbal* does not require as much, but rather "sufficient factual matter, accepted as true" to allow the court to draw the reasonable inference that Ashcroft was ultimately responsible for the decision. 556 U.S. at 678. We believe that Plaintiffs have met this burden.

alia, that Ashcroft made the decision to merge the lists in spite of the lack of individualized suspicion linking the MDC Plaintiffs to terrorism and that "Mueller and Ziglar were fully informed of this decision, and complied with it." Compl. ¶47; see also *id.* ¶¶55-57, 67. Mueller and Ziglar are not exculpated from this claim merely because Plaintiffs allege that they complied with, as opposed to ordered, the list merger. Plaintiffs plausibly plead that both were aware that the separate list contained detainees for whom the FBI had asserted no interest and that subjecting them to the challenged conditions would be facially unreasonable. Even if an official is not the source of a challenged policy, that official can be held personally liable for constitutional violations stemming from the execution of his superior's orders if those orders are facially invalid or clearly illegal. See, *e.g.*, *Varrone* v. *Bilotti*, 123 F.3d 75, 81 (2d Cir. 1997) (granting defendants qualified immunity where there was "no claim that the order was facially invalid or obviously illegal"). In this instance, Plaintiffs plausibly allege that Ashcroft's decision was facially invalid; it would be unreasonable for Mueller and Ziglar to conclude that holding ordinary civil detainees under the most restrictive conditions of confinement available was lawful.

4. *Punitive Intent*

The MDC Plaintiffs must show not only that the DOJ Defendants knew of and approved continued use of the ADMAX SHU, but also that they did so with punitive intent—that they endorsed the use of those conditions with an intent to punish the MDC Plaintiffs. Federal courts have long recognized that punitive intent is not often admitted. The Supreme Court has noted that it can be inferred if the conditions of confinement are "not reasonably related to a legitimate goal." *Wolfish*, 441 U.S. at

539. If the conditions under which one is held have no reasonable connection to a legitimate goal of the state, then one logical assumption is that they are imposed for no other purpose than to punish. See *id.*

The DOJ Defendants argue that even if they knew of the plight of the MDC Plaintiffs, the decision to continue their confinement at the MDC under exceptionally harsh conditions was motivated by national security concerns—a legitimate worry during the days following the 9/11 attacks—and not some animus directed at the MDC Plaintiffs. They seem to imply that once "national security" concerns become a reason for holding someone, there is no need to show a connection between those concerns and the captive other than that the captive shares common traits of the terrorist: illegal immigrant status and a perceived Arab or Muslim affiliation. Indeed, our dissenting colleague asserts that because the MDC Plaintiffs were, or appeared to be, members of the group—Arab or Muslim males—that was targeted for recruitment by al Qaeda that they could be held in the ADMAX SHU without any reasonable suspicion of terrorist activity. Dissenting Op., *post* at 64-65, 76-77. Under this view, the MDC Plaintiffs were not held with punitive intent because there was no way to know that they were not involved in terrorist activities. Simply being in the United States illegally and being, or appearing to be, Arab or Muslim was enough to justify detention in the most restrictive conditions of confinement available. Indeed, Levey admitted that the decision to merge the lists, ensuring that some of the 9/11 detainees would be subject to the challenged harsh conditions of confinement, was made because he "wanted to err on the side of caution so that a terrorist would not be released by mistake." OIG Report at 56.

This argument rests on the assumption that if an individual was an out-of-status Arab or Muslim, and someone called the FBI for even the most absurd reason, that individual was considered a possible threat to national security. It presumes, in essence, that all out-of-status Arabs or Muslims were potential terrorists until proven otherwise. It is built on a perception of a race and faith that has no basis in fact. There was no legitimate governmental purpose in holding someone in the most restrictive conditions of confinement available simply because he happened to be—or, worse yet, appeared to be—Arab or Muslim.

To be clear, it is "no surprise"—nor is it constitutionally problematic—that the enforcement of our immigration laws in the wake of 9/11 had a "disparate, incidental impact on Arab Muslims." *Iqbal*, 556 U.S. at 682. And we do not contend that Supreme Court, or our own, precedent requires individualized suspicion to subject detainees to *generally* restrictive conditions of confinement; restriction is an incident of detention. Rather, we simply acknowledge that "if a restriction or condition is not reasonably related to a legitimate goal—if it is arbitrary or purposeless—a court permissibly may infer that the purpose of the governmental action is punishment that may not constitutionally be inflicted upon detainees *qua* detainees." *Wolfish*, 441 U.S. at 539. We believe, then, that the challenged conditions—keeping detainees in their cells for twenty-three hours a day, constructively denying them recreation and exposing them to the elements, strip searching them whenever they were removed from or returned to their cells, denying them sleep by bright lights—were not reasonably related to a legitimate goal, but rather were punitive and unconstitutional.

While national security concerns could justify detaining those individuals with suspected ties to terrorism in these challenged conditions for the litany of reasons articulated by the dissent, see Dissenting Op., *post* at 67-68, those concerns do not justify detaining individuals solely on the basis of an immigration violation and their perceived race or religion in those same conditions. Individualized suspicion is required here because, absent some indication that the detainees had a tie to terrorism, the restrictions or conditions of the ADMAX SHU were "arbitrary or purposeless." *Wolfish*, 441 U.S. at 539.[31]

Indeed, in *Wolfish*, the Supreme Court acknowledged that "loading a detainee with chains and shackles and throwing him in a dungeon may ensure his [detention] and preserve the security of the institution. But it would be difficult to conceive of a situation where conditions so harsh, employed to achieve objectives that could be accomplished in so many alternative and less harsh methods, would not support a conclusion that the purpose for which they were imposed was to punish." *Id.* at 539 n.20. That is the situation before us. Clearly detention conditions less restrictive than the ADMAX SHU were feasi-

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[31] The dissent cites several cases that it claims demonstrate that individualized suspicion is not required for imposing restrictive conditions of confinement. Dissenting Op., *post* at 62-63. We do not disagree: individualized suspicion is not required to impose conditions that are reasonably related to a legitimate governmental objective. *Wolfish*, 441 U.S. at 539. Thus, in each of the cases cited by the dissent, rather than announce that individualized suspicion was not required, the Supreme Court determined that the restrictions at issue in each of those cases were related to the legitimate goal of prison security and, therefore, were not punitive. Thus, the cases cited by the dissent do not change our conclusion here, where the challenged conditions—the most restrictive available and imposed on detainees *qua* detainees—are not reasonably related to either the goal of prison security, or national security.

ble for the MDC Plaintiffs, given that the detainees held in the Passaic facility "were not held in isolation or otherwise placed in restrictive confinement." Compl. ¶66. Placing the MDC Plaintiffs in chains and shackles and throwing them in the ADMAX SHU ensured that they posed no threat in the aftermath of 9/11; but we can reach no conclusion other than that the DOJ Defendants' decision to do so was made with punitive intent.

In view of the foregoing, we hold that the MDC Plaintiffs fail to plausibly plead a substantive due process claim against the DOJ Defendants coextensive with the entire post-9/11 investigation and reaching back to the time of Plaintiffs' initial detention. Nonetheless, Plaintiffs' well-pleaded allegations, in conjunction with the OIG Report's documentation of events such as the New York List controversy, render plausible the claim that by the beginning of November 2001, Ashcroft knew of, and approved, the MDC Plaintiffs' confinement under severe conditions, and that Mueller and Ziglar complied with Ashcroft's order notwithstanding their knowledge that the government had no evidence linking the MDC Plaintiffs to terrorist activity. Discovery may ultimately prove otherwise, but for present purposes, the MDC Plaintiffs' substantive due process claim—with the exception of the temporal limitation noted above—may proceed against the DOJ Defendants.

5. *Qualified Immunity*

A defendant is entitled to qualified immunity if he can establish (1) that the complaint fails to plausibly plead that the defendant personally violated the plaintiff's constitutional rights, or (2) that the right was not clearly established at the time in question. See *Pearson* v. *Callahan*, 555 U.S. 223, 232 (2009); *Varrone*, 123 F.3d at 78 (noting that the qualified immunity inquiry turns, gener-

ally, on the objective legal reasonableness of a defendant's actions).

For the reasons stated above, the MDC Plaintiffs plausibly plead that the DOJ Defendants violated their substantive due process rights. With regard to the second prong of this inquiry, the law regarding the punishment of pretrial detainees was clearly established in the fall of 2001. As discussed, *Wolfish* made clear that a particular condition or restriction of pretrial detention not reasonably related to a legitimate governmental objective is punishment in violation of the constitutional rights of detainees. See 441 U.S. at 535-39 & n.20. And in *Hasty*, this Court denied qualified immunity with respect to a materially identical conditions claim against Hasty. 490 F.3d at 168-69. We explained that "[t]he right of pretrial detainees to be free from punitive restraints was clearly established at the time of the events in question, and no reasonable officer could have thought that he could punish a pretrial detainee by subjecting him to the practices and conditions alleged by the Plaintiff." *Id.* at 169.

Hasty further rejected the argument that the post-9/11 context warranted qualified immunity even if it was otherwise unavailable. *Id.* at 159-60, 169. Recognizing the "gravity of the situation" that 9/11 presented, we explained that qualified immunity remained inappropriate because a pretrial detainee's right to be free from punishment does not vary with the surrounding circumstances. *Id.* at 159. Nothing has undermined the logic or precedential authority of our qualified immunity holding in *Hasty*. We therefore conclude that the DOJ Defendants are not entitled to qualified immunity on the MDC Plaintiffs' conditions of confinement claim.

C. The MDC Defendants

In his opinion below, Judge Gleeson divided the MDC Plaintiffs' conditions of confinement claim against the MDC Defendants into two categories: "official conditions" allegations and "unofficial abuse" allegations. The "official conditions" allegations concern express confinement policies that the MDC Defendants approved and implemented; the "unofficial abuse" allegations concern the physical and verbal abuse that the MDC Defendants employed or permitted their subordinates to employ. We find this taxonomy helpful in analyzing the conditions claim against Hasty, Sherman, and Zenk.[32]

1. *Official Conditions*

The MDC Plaintiffs generally allege that the "official conditions" to which the MDC Defendants subjected them constituted punishment. We do not address whether Plaintiffs have sufficiently alleged an express intent to punish, but rather analyze whether they have plausibly pleaded that (1) the MDC Defendants caused them to suffer the challenged conditions, and that (2) the challenged conditions were "not reasonably related to a legitimate goal," which allows us to infer punitive intent, *Wolfish*, 441 U.S. at 539.

The MDC Plaintiffs plausibly plead that Hasty and Sherman are personally responsible for and caused the MDC Plaintiffs to suffer the challenged conditions. The Complaint contains allegations that Hasty ordered the creation of the ADMAX SHU and directed two of his subordinates to design "extremely restrictive conditions of confinement." Compl. ¶¶24, 75; see also *id.* ¶76 (de-

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[32] Plaintiffs' allegations against Zenk do not extend to the "unofficial abuse" nor to any harm arising from the "official conditions" that occurred prior to April 22, 2002, the date he became MDC Warden.

scribing the extreme conditions in the ADMAX SHU). According to the Complaint, those conditions were then approved and implemented by Hasty and Sherman. *Id.* ¶75.

The OIG reports support these allegations. While the decision to impose highly restrictive conditions was made at BOP headquarters, OIG Report at 19, MDC officials created the particular conditions imposed, *id.* at 124-25. The reports specify that MDC officials modified one wing of the preexisting SHU to accommodate the detainees and that the ADMAX SHU was "designed to confine the detainees in the most restrictive and secure conditions permitted by BOP policy." Supplemental OIG Report at 2-3. As Warden and Associate Warden of the MDC, Hasty and Sherman had the responsibility to carry out these tasks. But that alone would not sustain liability for either.

However, the MDC Plaintiffs also plausibly plead that Hasty and Sherman subjected them to the challenged conditions with punitive intent because the conditions were "not reasonably related to a legitimate goal." *Wolfish*, 441 U.S. at 539. Specifically, the MDC Plaintiffs allege that Hasty and Sherman imposed these harsh conditions despite the fact that they "were aware that the FBI had not developed any information to tie the MDC Plaintiffs [and other detainees] they placed in the ADMAX SHU to terrorism." Compl. ¶69. As discussed above with respect to the DOJ Defendants, individualized suspicion was not required to subject detainees to the restrictive conditions of confinement inherent in any detention. But the challenged conditions were not simply restrictive; they were punitive: there is no legitimate governmental purpose in holding someone as if he were a

terrorist simply because he happens to be, or appears to be, Arab or Muslim.

The MDC Defendants, and our dissenting colleague, note that BOP Headquarters ordered that the detainees "be placed in the highest level of restrictive detention" and, thus, argue that we cannot infer punitive intent from the MDC Defendants' compliance with that order. See Dissenting Op., *post* at 70 n.40, 71 (quoting OIG Report at 112). They further claim that because the FBI had designated the individuals held in the ADMAX SHU as "of interest," the MDC Defendants are absolved from liability. See, *e.g.*, Hasty Br. 17, 25-26.

But even if Hasty and Sherman *initially* believed that they would be housing only those detainees who were suspected of ties to terrorism, the Complaint contains sufficient factual allegations that the MDC Defendants eventually knew that the FBI lacked any individualized suspicion for many of the detainees that were sent to the ADMAX SHU. Plaintiffs allege that Hasty and Sherman received regular written updates explaining why each detainee had been arrested and including "all evidence relevant to the danger he might pose" to the MDC, and that these updates often lacked any indication of a suspicion of a tie to terrorism. Compl. ¶69.[33] They further explain that "[t]he exact language of these updates was repeated weekly, indicating the continued lack of any information

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[33] For example, the MDC Defendants were informed that Plaintiff Abbasi was "'encountered' by INS pursuant to an FBI lead; that he used a fraudulent passport to enter the U.S. to seek asylum, and later destroyed that passport; that he requested and was denied various forms of immigration relief; that he obtained and used a fraudulent advance parole letter to enter the country, and that he was thus inadmissible. The update included no statement of FBI interest in Abbasi." Compl. ¶72.

tying [Plaintiffs] to terrorism, or tending to show that any of them might pose a danger." *Id.* ¶73.

The MDC Plaintiffs relatedly allege that Hasty and Sherman knew that BOP regulations require individualized assessments for detainees placed in the SHU for more than seven days, yet ordered the MDC Plaintiffs' continued detention in the ADMAX SHU without performing these assessments, and Hasty "ordered [his] subordinates to ignore BOP regulations regarding detention conditions." *Id.* ¶68; see also *id.* ¶¶73-74.

The MDC Plaintiffs further allege that Hasty and Sherman approved a document that falsely stated that "executive staff at MDC had classified the 'suspected terrorists' as 'High Security' based on an individualized assessment of their 'precipitating offense, past terrorist behavior, and inability to adapt to incarceration.'" *Id.* ¶74. In addition, the MDC Plaintiffs allege that Hasty and Sherman continued to detain them in the ADMAX SHU even after affirmatively learning that the FBI lacked individualized evidence linking Plaintiffs to terrorism. See *id.* ¶¶69-71, 74. These allegations are buttressed by Plaintiffs' assertions that they remained confined in the ADMAX SHU even after receiving final clearance from the New York FBI field office and FBI Headquarters. For instance, the Complaint alleges that Benamar Benatta was cleared on November 14, 2001, that this information was available to the MDC, and that Benatta nonetheless remained in the ADMAX SHU until April 30, 2002. See *id.* ¶188.

The OIG Report directly supports these allegations; as stated by one BOP official, all 9/11 detainees at the MDC were placed in the ADMAX SHU and subjected to the official conditions because, at least initially, "the BOP did not really know whom the detainees were." OIG Report

at 19; see also Compl. ¶4; OIG Report at 112, 126. Specific factual allegations that Hasty and Sherman failed to assess whether the restrictive conditions were appropriate for individual 9/11 detainees buttress the MDC Plaintiffs' claim that the challenged conditions were not reasonably related to a legitimate goal, and that Hasty and Sherman were personally responsible for the treatment.

We recognize that the MDC Defendants may have been in a difficult position when they received detainees without accompanying information regarding those individuals. Record proof may eventually establish that the MDC Plaintiffs' claim is limited to the period of time that Hasty and Sherman knew that the MDC Plaintiffs were being held without suspicion of ties to terrorism. But we cannot conclude, at least at the motion to dismiss stage, that it was reasonable to take a default position of imposing the most restrictive form of detention available when one *lacks* individualized evidence that the detainee poses a danger to the institution or the nation. Accordingly, we conclude that the MDC Plaintiffs plausibly plead a substantive due process claim against Hasty and Sherman as to the official conditions.

The Complaint does not, however, permit an inference of personal liability as to Zenk, who did not become MDC Warden until April 22, 2002, when only two Plaintiffs remained in the ADMAX SHU. Fundamentally, the allegations that personally identify Zenk are too general and conclusory to support Plaintiffs' claim. We therefore dismiss the MDC Plaintiffs' substantive due process claim against Zenk.

2. *Unofficial Abuse*

The district court properly viewed the MDC Plaintiffs' "unofficial abuse" allegations under the deliberate indifference standard commonly applied in the Eighth

Amendment prisoner-mistreatment context. See *Turkmen III*, 915 F. Supp. 2d at 341 & n.13.[34] Given the nature of the MDC Plaintiffs' "unofficial abuse" allegations, premising liability on Hasty and Sherman's deliberate indifference is consistent with *Iqbal*'s holding that *Bivens* defendants are liable only if, through their own actions, they satisfy each element of the underlying constitutional tort. See 556 U.S. at 676.

Prior to *Iqbal*, this Court recognized claims against a supervisory defendant so long as the defendant was personally involved with the alleged constitutional violation. In *Colon* v. *Coughlin*, 58 F.3d 865, 873 (2d Cir. 1995), this Court identified five ways in which a plaintiff may establish a defendant's personal involvement. One is through a defendant's "deliberate indifference." *Id.* As the district court explained, the fact that a particular type of conduct constitutes "personal involvement" under *Colon* does not inherently preclude the conduct from also supporting a theory of direct liability. *Turkmen III*, 915 F. Supp. 2d at 335-36. For instance, plausibly pleading that a defendant "participated directly in the alleged constitutional violation"—one form of personal involvement enumerated in *Colon*, 58 F.3d at 873—could establish direct, as opposed to vicarious, liability. The proper inquiry is

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[34] The deliberate indifference standard would clearly apply if the MDC Plaintiffs had been prisoners entitled to the Eighth Amendment's protection against cruel and unusual punishment. See *Walker* v. *Schult*, 717 F.3d 119, 125 (2d Cir. 2013). Because a pretrial detainee's rights are at least as robust as those of a sentenced prisoner, we have applied the Eighth Amendment deliberate indifference test to pretrial detainees bringing claims under the Due Process Clause of the Fifth Amendment. See, *e.g.*, *Cuoco* v. *Moritsugu*, 222 F.3d 99, 106 (2d Cir. 2000). We do not address whether civil immigration detainees should be governed by an even more protective standard than pretrial criminal detainees.

not the name we bestow on a particular theory or standard, but rather whether that standard—be it deliberate indifference, punitive intent, or discriminatory intent—reflects the elements of the underlying constitutional tort. See *Iqbal*, 556 U.S. at 676 ("The factors necessary to establish a *Bivens* violation will vary with the constitutional provision at issue.").

Our conclusion is consistent with *Iqbal*, this Court's prior rulings, see *Walker*, 717 F.3d at 125, and the weight of Circuit precedent. For instance, in *Starr* v. *Baca*, 652 F.3d 1202, 1206-07 (9th Cir. 2011), the Ninth Circuit determined that *Iqbal* does not preclude *Bivens* claims premised on deliberate indifference when the underlying constitutional violation requires no more than deliberate indifference. See also *Dodds* v. *Richardson*, 614 F.3d 1185, 1204-05 (10th Cir. 2010); *Sandra T.E.* v. *Grindle*, 599 F.3d 583, 590-91 (7th Cir. 2010); *Sanchez* v. *Pereira-Castillo*, 590 F.3d 31, 49 (1st Cir. 2009).

The MDC Plaintiffs' "unofficial abuse" claim therefore survives so long as Plaintiffs plausibly plead that the conditions were sufficiently serious, and Hasty and Sherman "kn[e]w of, and disregard[ed], an excessive risk to inmate health or safety." *Walker*, 717 F.3d at 125 (internal quotation marks omitted); accord *Cuoco*, 222 F.3d at 107. The MDC Plaintiffs clearly meet this standard with respect to Hasty. Simply stated, their factual allegations permit the inference that he knew that MDC staff subjected the MDC Plaintiffs to the "unofficial abuses" and permitted—if not facilitated—the continuation of these abuses. See Compl. ¶¶24, 77-78, 107, 109-10.

For example, the Complaint contains allegations that Hasty avoided evidence of detainee abuse by "neglecting to make rounds on the ADMAX [SHU] unit," as was required of him by BOP policy. *Id.* ¶24. The MDC Plain-

tiffs also allege that Hasty was nonetheless made aware of the abuse "through inmate complaints, staff complaints, hunger strikes, and suicide attempts." *Id.*; see also *id.* ¶¶ 77-78 (detailing how Hasty made it difficult for detainees to file complaints and ignored the evidence when they did, and how staff officials who complained were called "snitches" and were threatened). Indeed, complaints about abuse of 9/11 detainees were pervasive enough to cause the BOP to videotape all detainee movements and resulted in the investigations later detailed in the OIG reports. *Id.* ¶107. The MDC Plaintiffs also complain that Hasty encouraged his subordinates' harsh treatment of the detainees by himself referring to the detainees as terrorists. *Id.* ¶¶ 77, 109.

The allegations against Sherman, because they are more general and conclusory in nature, are more tenuous. For instance, Plaintiffs allege principally that Sherman "allowed his subordinates to abuse MDC Plaintiffs and class members with impunity. Sherman made rounds on the ADMAX SHU and was aware of conditions there." *Id.* ¶26. These allegations lack a specific factual basis to support a claim that Sherman was aware of the particular abuses at issue. Therefore, we hold that the MDC Plaintiffs fail to plausibly plead an unofficial conditions claim as to Sherman.[35]

3. *Qualified Immunity*

The MDC Defendants claim that qualified immunity is appropriate because they were merely following the orders of BOP superiors, "with the input and guidance of the FBI and INS." See, *e.g.*, Hasty Br. 33. Specifically,

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[35] The MDC Plaintiffs nonetheless maintain a substantive due process claim against Sherman as to the official conditions, as discussed *supra*.

Hasty claims that the "BOP, INS, and FBI officials ordered [him] to place 'high interest' 9/11 detainees in the ADMAX SHU, and directed that they be subject to the 'tightest' security possible." *Id.* He further argues that "[t]he sole basis for the detainees' confinement in the ADMAX SHU—the FBI's investigative interest—was outside the scope of MDC officials' discretion." *Id.* at 35. By extension, he claims that it was reasonable to detain the MDC Plaintiffs and other "high interest" 9/11 detainees in the ADMAX SHU.

These arguments fail. First, as with the DOJ Defendants, our qualified immunity analysis in *Hasty* applies with equal force to the MDC Plaintiffs' conditions claim against Hasty and Sherman in this case. See *Hasty*, 490 F.3d at 168-69. In 2001, it was clearly established that punitive conditions of confinement, like those involved here, could not be imposed on pretrial detainees such as the MDC Plaintiffs. As discussed above with respect to the DOJ Defendants, *Wolfish* made clear that a condition of pretrial detention not reasonably related to a legitimate governmental objective is punishment in violation of the constitutional rights of detainees. See 441 U.S. at 535-39 & n.20; *Hasty*, 490 F.3d at 169. Furthermore, given the nearly identical claims and circumstances in Hasty and this case, we see no reason to depart from our prior determination that *Hasty* was not entitled to qualified immunity.

Nor is Hasty entitled to qualified immunity with regard to the unofficial conditions claim. As discussed, the MDC Plaintiffs have plausibly alleged that Hasty personally violated their constitutional rights by knowing of, and disregarding, an excessive risk to their health or safety. The right of the MDC Plaintiffs to be free from such unofficial abuse was clearly established at the time

of the events in question. See, *e.g.*, *DeShaney* v. *Winnebago Cnty. Dep't of Soc. Servs.*, 489 U.S. 189, 200 (1989) ("[W]hen the State by the affirmative exercise of its power so restrains an individual's liberty that it renders him unable to care for himself, and at the same time fails to provide for his basic human needs—*e.g.*, food, clothing, shelter, medical care, and reasonable safety—it transgresses the substantive limits on state action set by . . . the Due Process Clause."); see also *Walker*, 717 F.3d at 125, 130; *Cuoco*, 222 F.3d at 106.

Plaintiffs' allegations, the OIG Report, and the MDC Defendants' arguments confirm that Hasty and Sherman housed 9/11 detainees for extended periods of time in highly restrictive conditions without ever obtaining individualized information that would warrant this treatment. Because Plaintiffs' allegations support an inference of punitive intent, and it would be inappropriate to wrestle with competing factual accounts at this stage of the litigation, we hold that a reasonable officer in the MDC Defendants' position would have concluded that this treatment was not reasonably related to a legitimate goal.

IV. Claim 2: Equal Protection—Conditions Of Confinement

Plaintiffs next assert a claim that Defendants subjected them to the harsh conditions of confinement detailed above based on their race, ethnicity, religion, and/or national origin, in violation of the equal protection guarantee of the Fifth Amendment.[36]

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[36] All Plaintiffs assert an equal protection claim against the DOJ Defendants. Abbasi, Khalifa, Mehmood, and Bajracharya do not assert this claim against Zenk, and Sachdeva and Turkmen do not make this claim against any of the MDC Defendants.

A. Applicable Legal Standard

To state an equal protection violation under the Fifth Amendment, "the plaintiff must plead and prove that the defendant acted with discriminatory purpose." *Iqbal*, 556 U.S. at 676. "[P]urposeful discrimination requires more than intent as volition or intent as awareness of consequences." *Id.* (internal quotation marks omitted). "It instead involves a decisionmaker's undertaking a course of action because of, not merely in spite of, [the action's] adverse effects upon an identifiable group." *Id.* at 676-77 (alteration in original) (internal quotation marks omitted).

A plaintiff can show intentional discrimination by: (1) "point[ing] to a law or policy that expressly classifies persons on the basis of" a suspect classification; (2) "identify[ing] a facially neutral law or policy that has been applied in an intentionally discriminatory manner[;]" or (3) "alleg[ing] that a facially neutral statute or policy has an adverse effect and that it was motivated by discriminatory animus." *Brown* v. *City of Oneonta, N.Y.*, 221 F.3d 329, 337 (2d Cir. 2000) (internal quotation marks omitted).

The district court characterized Plaintiffs' equal protection claim as falling within the first category—that is, a claim that Defendants subjected Plaintiffs to the challenged conditions of confinement pursuant to a policy that expressly classified Plaintiffs on the basis of their race, ethnicity, religion, and/or national origin. Given our reading of Plaintiffs' allegations and arguments on appeal, we will not analyze this claim, particularly as it relates to the MDC Defendants, under the first equal protection theory alone.

B. The DOJ Defendants

The district court concluded that Plaintiffs failed to state an equal protection claim against the DOJ Defendants, but "f[ou]nd the issue to be a close one." *Turkmen III*, 915 F. Supp. 2d at 345. In view of our analysis of Plaintiffs' substantive due process claim against the DOJ Defendants, and particularly these Defendants' roles with respect to the merger of the New York List, we hold that the MDC Plaintiffs have adequately alleged an equal protection claim against Ashcroft, Mueller, and Ziglar.

Plaintiffs' well-pleaded allegations and the OIG Report give rise to the following reasonable inferences, which render plausible the MDC Plaintiffs' equal protection claim against the DOJ Defendants: (1) the New York FBI field office discriminatorily targeted individuals in the 9/11 investigation not based on individualized suspicion, but rather based on race, ethnicity, religion, and/or national origin, and those individuals were then placed on the New York List; (2) the DOJ Defendants knew about the discriminatory manner in which the New York FBI field office placed individuals on the New York List; and (3) the DOJ Defendants condoned the New York FBI's discrimination by merging the New York List with the INS List, thereby ensuring that some of the individuals on the New York List would be subjected to the challenged conditions of confinement.

Plaintiffs allege that the New York FBI field office targeted individuals in the PENTTBOM investigation and placed them on the New York List based on race, ethnicity, religion, and/or national origin. "[T]he head of the New York FBI field office stated that an individual's Arab appearance and status as a Muslim were factors to consider in the investigation." Compl. ¶42. Even more telling, a supervisor in the same local FBI office, "who

oversaw the clearance process[,] stated that a tip about Russian tourists filming the Midtown tunnel was 'obviously' of no interest, but that the same tip about Egyptians was of interest." *Id.* Individuals who were arrested by the New York FBI and INS in connection with a PENTTBOM lead were automatically treated as "of interest," OIG Report at 40-41, and were placed on the New York List, see *id.* at 53.

This discriminatory approach, focusing on "an individual's Arab appearance," Compl. ¶42, is consistent with what is alleged to have occurred in Bajracharya's case. Bajracharya, who as noted, is a Buddhist and native of Nepal, came to the FBI's attention when an employee from the Queens County District Attorney's Office "observed an '[A]rab male' videotaping outside a Queens[ ] office building that contained the Queens County District Attorney['s] Office and a New York FBI office." *Id.* ¶230. Investigators from the District Attorney's Office questioned Bajracharya about "why he was taking pictures," and Bajracharya "tried to explain that he was a tourist." *Id.* He was arrested after acknowledging he overstayed his visa and was detained in the ADMAX SHU. Given the Complaint's allegations regarding the New York FBI's tactics, it is reasonable to infer that officials in the New York FBI targeted certain individuals, including Plaintiffs, for investigation, arrest, and placement on the New York List simply because they were, or appeared to be, Arab or Muslim, *and not* because of any suspicion regarding a link to terrorism.

As we conclude above with respect to the substantive due process claim, the DOJ Defendants were informed of the problems presented by the New York List. As noted, the OIG Report reveals that by October 2001 the SIOC Working Group learned about the New York List and

that "officials at the INS, FBI, and [DOJ] raised concerns about, among other things, whether the aliens had any nexus to terrorism." OIG Report at 53. Plaintiffs allege that a high-ranking DOJ official noted that individuals were detained "without any attempt" to determine if they were of "actual interest," and that the official "was concerned early in the investigation that detainees were being held simply on the basis of their ethnicity." Compl. ¶45. The DOJ Defendants were unlikely to have remained unaware of these concerns, as they "received detailed daily reports of the arrests and detentions," *id.* ¶47, see also *id.* ¶¶63-64, and Mueller "was in daily contact with the FBI field offices regarding the status of individual clearances," *id.* ¶57. In light of these allegations, we can reasonably infer that these Defendants were aware that the New York FBI field office was placing individuals on the New York List not because of any suspected ties to terrorism but rather because they were, or were perceived to be, Arab or Muslim.

While the DOJ Defendants' mere knowledge of this discriminatory action by the New York FBI field office would be insufficient to allow for the reasonable inference that these Defendants possessed the discriminatory purpose required to state an equal protection claim, Plaintiffs' allegations are not limited to the DOJ Defendants' knowledge alone. Rather, as we discuss in detail in the substantive due process analysis above, Plaintiffs plausibly plead that Ashcroft made the decision to merge the New York List with the national INS List, ensuring that some of the individuals on the New York List would be placed in, or remain detained in, the challenged conditions of confinement. Plaintiffs further allege that Mueller and Ziglar were aware that the New York List contained detainees against whom the FBI had asserted

no interest and that subjecting them to the challenged conditions would be facially unreasonable. In ordering and complying with the merger of the New York List, the DOJ Defendants actively condoned the New York FBI field office's discriminatory formulation of that list.

The DOJ Defendants' condonation of the New York FBI field office's purposeful discrimination allows us to reasonably infer at the motion to dismiss stage that the DOJ Defendants themselves acted with discriminatory purpose. The Supreme Court in *Iqbal* stated that "discrete wrongs—for instance, beatings—by lower level Government actors[ ] . . . if true, and if condoned by [Ashcroft and Mueller], could be the basis for some inference of wrongful intent on [Ashcroft and Mueller's] part." 556 U.S. at 683. In a similar vein, we have held, in a case involving an equal protection claim under 42 U.S.C. §1983, that a reasonable factfinder could conclude that the Commissioner of the Fire Department of the City of New York intended to discriminate when he decided to continue to use the results of employment examinations that he knew had a disparate impact based on race. See *United States* v. *City of New York*, 717 F.3d 72, 94 (2d Cir. 2013). Here, it is reasonable to infer that Ashcroft, Mueller, and Ziglar possessed the requisite discriminatory intent because they knew that the New York List was formed in a discriminatory manner, and nevertheless condoned that discrimination by ordering and complying with the merger of the lists, which ensured that the MDC Plaintiffs and other 9/11 detainees would be held in the challenged conditions of confinement.

Contrary to the dissent's contentions, see Dissenting Op., *post* at 76-78, this case is distinguishable from *Iqbal*, where the Supreme Court concluded that the plaintiff failed to state an equal protection claim. In *Iqbal*, there

were "more likely explanations" for why the plaintiff was detained in harsh conditions other than his race, religion, or national origin. 556 U.S. at 681. Those more likely explanations for the plaintiff's treatment, according to the Supreme Court, were that Ashcroft and Mueller supported "a legitimate policy . . . to arrest and detain individuals *because of their suspected link to the attacks*," which "produce[d] a disparate, incidental impact on Arab Muslims, even though the purpose of the policy was to target neither Arabs nor Muslims." *Id.* at 682 (emphasis added). The Supreme Court noted that "*[o]n the facts respondent alleges* the arrests Mueller oversaw were likely lawful and justified by his nondiscriminatory intent to detain aliens who were illegally present in the United States *and who had potential connections to those who committed terrorist acts.*" *Id.* (emphasis added); see also *id.* at 683 (noting that all the allegations in *Iqbal* "suggest[ed] is that the Nation's top law enforcement officers . . . sought to keep *suspected terrorists* in the most secure conditions available until the suspects could be cleared of terrorist activity" (emphasis added)).

In this case, unlike in *Iqbal*, it is not "more likely" that the MDC Plaintiffs were detained in the challenged conditions *because of* their suspected ties to the 9/11 attacks. Indeed, as discussed at length earlier, Plaintiffs have plausibly alleged that they were detained without *any* suspicion of a link to terrorist activity and that the DOJ Defendants knew that the government lacked information tying Plaintiffs to terrorist activity, but decided to merge the lists anyway.[37] Thus, unlike in *Iqbal*, there was

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[37] Given the clear language used by the Supreme Court in *Iqbal* regarding the detainees' connections to terrorism, 556 U.S. at 682-83, we understand the *Iqbal* Court to have rejected as conclusory the allegation in the *Iqbal* complaint identified by the dissent, which only

no legitimate reason to detain the MDC Plaintiffs in the challenged conditions and, thus, no obvious, more likely explanation for the DOJ Defendants' actions with respect to the New York List merger.[38]

The dissent also argues that we cannot plausibly infer the DOJ Defendants' discriminatory intent from the merger decision because not all of the individuals on the New York List were subjected to the same level of restrictive confinement. See Dissenting Op., *post* at 79-80. But the fact that some individuals of the same race, ethnicity, religion, and/or national origin as the MDC Plaintiffs were restrained in the Passaic County Jail, as opposed to the ADMAX SHU, hardly dooms the MDC Plaintiffs' claim against the DOJ Defendants. There is no allegation that the DOJ Defendants were responsible for the assignment of certain actual or perceived Arab and Muslim males to Passaic as opposed to the more restrictive ADMAX SHU. See OIG Report at 17-18, 126-27, 158

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pleads in the broadest terms that the *Iqbal* plaintiffs were confined without "any individual determination" that such restrictions were "appropriate or should continue." See Dissenting Op., *post* at 81-82 (quoting First Am. Compl. ¶97, App. to Pet. for Cert. 173a, *Ashcroft* v. *Iqbal*, No. 07-1015 (U.S. Feb. 6, 2008), available at http://1.usa.gov/1CfHJQF). Here, in contrast, the well-pleaded allegations, as supported by the OIG reports, allege that the DOJ Defendants made, and complied with, the decision to merge the New York List with the national INS List, thereby ensuring that the MDC Plaintiffs, and others, remained in the challenged conditions of confinement despite the absence of any suspicion that they were tied to terrorism.

[38] Furthermore, the fact that Plaintiffs plausibly plead that the DOJ Defendants merged the New York List, and complied with the list merger, based on punitive intent (the substantive due process claim) arguably suggests the plausibility of the MDC Plaintiffs' allegations that the DOJ Defendants also possessed the discriminatory intent required for an equal protection claim. See *supra* Section III.B.

(noting that assignment responsibility fell largely to the arresting FBI agent). Rather, Plaintiffs have plausibly alleged that the DOJ Defendants condoned and ratified the New York FBI's discrimination in *identifying* detainees by merging the New York List with the INS List. The DOJ Defendants, apparently deferring to others' designation of detainees for particular facilities, thus ensured that some (and for all they knew, all) of the individuals on the New York List would be subjected to the challenged conditions of confinement solely on the basis of discriminatory criteria. The fact that some of these individuals were actually assigned to the less restrictive Passaic facility is thus a red herring.[39]

Based on the foregoing, we conclude that the MDC Plaintiffs' allegations are sufficient to state an equal protection claim against Ashcroft, Mueller, and Ziglar for their condonation of the New York FBI's discriminatory formulation of the New York List, which resulted in the MDC Plaintiffs being subjected to the conditions of confinement challenged here.

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[39] Moreover, to the extent this differential assignment of class members, again apparently by agents of the New York FBI and not the DOJ Defendants, might be relevant to Plaintiffs' equal protection claim, because it could suggest that the New York FBI was not actually discriminating, it is more appropriately considered at summary judgment. Indeed, the cases embraced by the dissent conclude that evidence of differential treatment of members of the same class may weaken an inference of discrimination *at the summary judgment stage*. See *O'Connor* v. *Consol. Coin Caterers Corp.*, 517 U.S. 308, 309 (1996) (summary judgment); *Fleming* v. *MaxMara USA, Inc.*, 371 F. App'x 115, 116 (2d Cir. 2010) (summary order) (summary judgment); *James* v. *N.Y. Racing Ass'n*, 233 F.3d 149, 151 (2d Cir. 2000) (summary judgment). In light of the well-pleaded allegations regarding discrimination by the New York FBI, Plaintiffs have hardly pleaded themselves out of court on this point.

C. The MDC Defendants

We agree with the district court that the MDC Plaintiffs have stated a plausible equal protection claim against Hasty and Sherman, although we base our decision on somewhat different reasoning than that employed by the court below. However, we do not agree with the district court that the MDC Plaintiffs have adequately alleged this claim against Zenk.

Our conclusion focuses on allegations of mendacity by Hasty and Sherman regarding the basis for detaining the MDC Plaintiffs in the ADMAX SHU. The Complaint asserts that Hasty and Sherman "were aware that placing the 9/11 detainees in the ADMAX SHU unit without an individualized determination of dangerousness or risk was unlawful." Compl. ¶74. However, these Defendants never actually undertook that "required individualized assessment." *Id.* ¶73. Nevertheless, Hasty and Sherman approved a document that "untruthfully stated that the executive staff at [the] MDC had classified the 'suspected terrorists' as 'High Security' based on an individualized assessment of their 'precipitating offense, past terrorist behavior, and inability to adapt to incarceration.'" *Id.* ¶74. In fact, neither Hasty nor Sherman "saw or considered information in any of these categories in deciding to place the 9/11 detainees in the ADMAX SHU." *Id.*;[40] see also *id.* ¶¶68-72 (Hasty and Sherman held the MDC Plaintiffs in the ADMAX SHU knowing that they were not tied to terrorism and without performing the re-

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[40] As previously noted, the term "9/11 detainees" is defined in the Complaint as noncitizens from the Middle East, South Asia, and elsewhere who are Arab or Muslim, or were perceived to be Arab or Muslim. Individuals with certain of these characteristics who were arrested and detained in response to the 9/11 attacks constitute the putative class in this case.

quired individualized assessment of whether Plaintiffs posed a danger to the facility).

Based on the foregoing allegations of duplicity regarding the basis for confining the 9/11 detainees, it is reasonable to infer that Hasty and Sherman approved this false document to justify detaining actual or perceived Arabs and Muslims in the harsh conditions of the ADMAX SHU based on discriminatory intent. *Cf. Reeves* v. *Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 147 (2000) (in the employment discrimination context, "the trier of fact can reasonably infer from the falsity of the explanation that the employer is dissembling to cover up a discriminatory purpose"); *id.* (an inference of discriminatory purpose based on an employer's false explanation "is consistent with the general principle of evidence law that the factfinder is entitled to consider a party's dishonesty about a material fact as affirmative evidence of guilt" (internal quotation marks omitted)); *St. Mary's Honor Ctr.* v. *Hicks*, 509 U.S. 502, 511 (1993) ("disbelief of the reasons put forward by the defendant (particularly if disbelief is accompanied by a suspicion of mendacity) may . . . show intentional discrimination" in the employment discrimination context).

The dissent argues that we cannot infer discriminatory intent from the MDC Defendants' approval of this false document, concluding that the "more likely" reason for this mendacity is these Defendants' concern for national security. See Dissenting Op., *post* at 83-84. Although recognizing that the MDC Defendants might be faulted for approving a false document stating that each detainee had been assessed as a "High Security" "suspected terrorist[ ]," our dissenting colleague believes Hasty and Sherman's actions are more likely explained by reliance on the FBI's designation of each MDC Plain-

tiff as a person "of interest" or "of high interest" to the ongoing terrorism investigation. Yet, the allegations in the Complaint belie this alternative explanation for Hasty and Sherman's dishonesty. Plaintiffs allege that the "MDC Defendants were aware that the FBI had not developed *any information*" to tie the 9/11 detainees to terrorism. Compl. ¶69 (emphasis added). Indeed, the MDC Defendants received regular updates on the FBI's investigation, *including* the dearth of evidence connecting the 9/11 detainees to terrorism. Such briefing—placing Hasty and Sherman on repeated notice of the lack of any specific information justifying restrictive confinement in the ADMAX SHU—renders implausible the innocent explanation for their mendacity.

As an additional matter, the fact that the false document that Hasty and Sherman approved, on its face, applied to suspected terrorists and not just actual or perceived Arabs and Muslims does not undermine the reasonableness of the inference that these Defendants acted based on discriminatory intent. Plaintiffs allege that Hasty and Sherman approved the document even though they had not performed the required individualized assessments and knew that keeping "the 9/11 detainees" in the ADMAX SHU without those assessments was unlawful. *Id.* ¶¶73-74. They further allege that, in approving the document, Hasty and Sherman failed to consider the past offenses, past terrorist activity, and inability to adapt to incarceration with respect to "the 9/11 detainees." *Id.* ¶74. Based on Plaintiffs' allegations about how the false document related in particular to the 9/11 detainees, a group the Complaint specifically defines on racial, ethnic, and religious grounds, see *id.* ¶1, it is reasonable to infer, at least at the motion to dismiss stage, that

Hasty and Sherman lied in order to conceal an intent to discriminate on the basis of suspect classifications.

Further buttressing this inference, the Complaint asserts that MDC staff used racially, ethnically, and religiously charged language to refer to the MDC Plaintiffs. See *id.* ¶109 (MDC staff referred to the MDC Plaintiffs as terrorists and insulted their religion); *id.* ¶110 (Saeed Hammouda and others complained "that MDC staff called them 'camel[s]'"); *id.* ¶136 (MDC staff mocked Plaintiffs' prayers and interrupted their praying by "screaming derogatory anti-Muslim comments"); *id.* ¶218 (during his transport and processing Hammouda was called "Arabic asshole"). These allegations are supported by the OIG reports. See OIG Report at 144 (noting allegations that MDC officers used racial slurs); Supplemental OIG Report at 28-30 (concluding that some MDC staff verbally abused detainees based on their Muslim faith, among other grounds).

The context in which the term "terrorist" was used at the MDC bolsters the inference that the MDC Plaintiffs were believed to be terrorists simply because they were, or were perceived to be, Arab or Muslim. Significantly, the term "terrorist" was not used in isolation. Rather, MDC staff called the MDC Plaintiffs "'fucking Muslims' and 'terrorists,'" Compl. ¶147, as well as "'terrorist' and 'Arabic asshole,'" *id.* ¶218; see also Supplemental OIG Report at 28 (noting that along with the term "terrorists," MDC staff referred to detainees as "fucking Muslims" and "bin Laden Junior" (internal quotation marks omitted)).

While most of the aforementioned comments are not directly attributed to Hasty, Sherman, or Zenk, Plaintiffs do allege that the use of racially, ethnically, and religiously charged language was brought to the attention of the

MDC Defendants through detainee complaints and reports from MDC staff, among other means. Mere knowledge of the MDC staff's discriminatory comments, of course, is insufficient to infer shared discriminatory intent by Hasty, Sherman, or Zenk. See *Iqbal*, 556 U.S. at 676-77. However, with respect to Hasty, Plaintiffs allege more than mere awareness of the MDC staff's discriminatory treatment of the MDC Plaintiffs. Plaintiffs claim that Hasty fostered the MDC staff's use of discriminatory language to refer to the MDC Plaintiffs by himself "referring to the detainees as 'terrorists,'" Compl. ¶77, see also *id.* ¶109, notwithstanding Hasty's knowledge that the MDC Plaintiffs lacked ties to terrorism. Hasty's knowledge about the charged manner in which the term "terrorist" was used to refer to the MDC Plaintiffs, and his personal use of the term in that context, renders even more plausible the conclusion that he approved the false document justifying the MDC Plaintiffs' detention in the ADMAX SHU based on discriminatory animus. Given the fact that the 9/11 hijackers were Arab Muslims, and Hasty knew that there were no articulable ties between the MDC Plaintiffs and terrorism, Plaintiffs plausibly plead that Hasty referred to the MDC Plaintiffs as terrorists, and treated them as if they were, simply because they were, or he believed them to be, Arab or Muslim.

In view of the foregoing, the MDC Plaintiffs have stated a plausible claim that Hasty and Sherman detained them in the challenged conditions because of their race, ethnicity, religion, and/or national origin. These Defendants' approval of the false document, and Hasty's use of charged language in the particular context of the MDC Plaintiffs' detention, support the reasonable inference that Hasty and Sherman subjected the MDC Plain-

tiffs to harsh conditions of confinement based on suspect classifications.

With respect to Zenk, the MDC Plaintiffs' allegations are more limited and fail to support the reasonable inference that he established or implemented the alleged conditions of confinement based on animus that offends notions of equal protection.

D. Qualified Immunity

The DOJ Defendants, Hasty, and Sherman are not entitled to qualified immunity on the MDC Plaintiffs' equal protection claim. With regard to the first prong of this inquiry, whether the complaint plausibly pleads that a defendant personally violated the plaintiff's constitutional rights, for the reasons stated above, the MDC Plaintiffs have plausibly alleged that Ashcroft, Mueller, Ziglar, Hasty, and Sherman violated their rights under the equal protection guarantee.

With respect to the second prong of the inquiry, it was clearly established at the time of Plaintiffs' detention that it was illegal to hold individuals in harsh conditions of confinement and otherwise target them for mistreatment because of their race, ethnicity, religion, and/or national origin. Plaintiffs' right "not to be subjected to ethnic or religious discrimination[ ] w[as] . . . clearly established prior to 9/11, and . . . remained clearly established even in the aftermath of that horrific event." *Hasty*, 490 F.3d at 160. In *Hasty*, the plaintiff alleged "that he was deemed to be 'of high interest,' and accordingly was kept in the ADMAX SHU under harsh conditions, solely because of his race, ethnicity, and religion," and "that Defendants specifically targeted [him] for mistreatment because of [his] race, religion, and national origin." *Id.* at 174 (alterations in original). We concluded "that any reasonably competent officer would understand [those alleged ac-

tions] to have been illegal under prior case law." *Id.* (internal quotation marks omitted). There is no reason that this analysis should not govern here. Although, as the dissent notes, see Dissenting Op., *post* at 62, *Hasty* employed a more lenient pleading standard than what we now utilize in assessing factual allegations, this hardly prevents us from relying on its conclusions as to whether certain legal principles were clearly established at the time of Plaintiffs' detention. Accordingly, in view of the sufficiency of the MDC Plaintiffs' allegations here, the DOJ Defendants, Hasty, and Sherman are not entitled to qualified immunity on this claim.

We reverse the portion of the district court's decision that dismissed the MDC Plaintiffs' equal protection claim against the DOJ Defendants, affirm the district court's denial of Hasty and Sherman's motions to dismiss the MDC Plaintiffs' claim, and reverse the district court's decision denying Zenk's motion to dismiss the equal protection claim.

Because the Passaic Plaintiffs were held in the general population and not the ADMAX SHU, we agree with the district court that they have failed to adequately plead that they were subjected to harsh conditions of confinement because of their race, ethnicity, religion, and/or national origin. Thus, we affirm the district court's dismissal of the Passaic Plaintiffs' equal protection claim.

V. Claim 6: Unreasonable And Punitive Strip Searches

The MDC Plaintiffs claim that they were subject to unreasonable and punitive strip searches while detained

at the MDC, in violation of the Fourth and Fifth Amendments.[41]

A. Applicable Legal Standard

Determining the legal standard that applies to this claim turns on whether the MDC Plaintiffs were held in a prison or a jail. See *Hasty*, 490 F.3d at 172. In *Hasty*, we decided that the plaintiff, who was detained in the ADMAX SHU at the MDC (like the MDC Plaintiffs here), should be treated in accordance with the standard governing prisons. See *id.* Under that standard, a "regulation is valid if it is reasonably related to legitimate penological interests." *Turner* v. *Safley*, 482 U.S. 78, 89 (1987). Given that the parties here do not argue for a different standard, we assume that the foregoing standard applies in this case.[42]

B. The MDC Defendants

The MDC Plaintiffs allege that Defendant Joseph Cuciti, a former lieutenant at the MDC and not a party on

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[41] Only the MDC Plaintiffs assert this claim, which is only raised against the MDC Defendants. Benatta and Hammouda alone assert this claim against Zenk. To the extent that the MDC Plaintiffs' allegations regarding the strip searches are cognizable under the Fifth Amendment, we factor these allegations into our analysis of the substantive due process claim, which is discussed above. See *supra* Section III.C.

[42] We note, however, that this standard governs prison regulations, see *Turner*, 482 U.S. at 89, and that the application of this standard in *Hasty* may have been justified because the plaintiff in that case faced criminal charges (apparently felonies), see 490 F.3d at 147-48 & n.1, 162 n.8, 172. In contrast, Plaintiffs here were almost exclusively charged with civil immigration violations and were detained on that basis. While it may be that a different standard, one more favorable to detainees, should govern the constitutionality of searches in the context of civil immigration detention, we leave that question for another day.

appeal, was tasked with "developing the strip search policy on the ADMAX [SHU]." Compl. ¶111. Plaintiffs further claim that "Hasty ordered . . . Cuciti to design extremely restrictive conditions of confinement." *Id.* ¶75. The reasonable inference based on these allegations is that Hasty ordered Cuciti to develop the strip-search policy, which was "then approved and implemented by Hasty and Sherman, and, later, by Zenk." *Id.*

Plaintiffs allege that the 9/11 detainees at the MDC were strip searched upon arrival, and again after they had been escorted in shackles and under continuous guard to the ADMAX SHU. They were also strip searched every time they were taken from or returned to their cells, including after non-contact attorney visits, when "physical contact between parties was prevented by a clear partition," OIG Report at 123, and when being transferred from one cell to another. Benatta was strip searched on September 23, 24, and 26 of 2001, even though he was not let out of his cell on any of those days. Numerous strip searches were documented in a "visual search log" that was created for review by MDC management, including Hasty. Compl. ¶114 (internal quotation marks omitted).

Plaintiffs' allegations regarding the strip searches are supported by the Supplemental OIG Report, which concluded that MDC staff "inappropriately used strip searches to intimidate and punish detainees." Supplemental OIG Report at 35. That report also "questioned the need for the number of strip searches, such as after attorney and social visits in non-contact rooms." *Id.*

The foregoing allegations, supported as they are by the Supplemental OIG Report, are sufficient to establish at this stage of the litigation that Hasty and Sherman were personally involved in creating and executing a

strip-search policy that was not reasonably related to legitimate penological interests. Hasty ordered the policy, and both he and Sherman approved and implemented it. Under that policy, the MDC Plaintiffs were strip searched when there was no possibility that they could have obtained contraband. Plaintiffs have alleged that Hasty and Sherman were aware of these searches either based on the search log that was created for review by MDC management, or because they were involved in the implementation of the strip-search policy.[43] These allegations give rise to a plausible Fourth Amendment claim against Hasty and Sherman. See *Hasty*, 490 F.3d at 172 (finding a plausible allegation of a Fourth Amendment violation in the post-9/11 context where the plaintiff alleged that he "was routinely strip searched twice after returning from the medical clinic or court and that, on one occasion, [he] was subjected to three serial strip and body-cavity searches in the same room"); *Hodges* v. *Stanley*, 712 F.2d 34, 35 (2d Cir. 1983) (noting that because "there was no possibility that [the plaintiff] could have obtained and concealed contraband[] ... the second search appears to have been unnecessary").[44]

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[43] To the extent the dissent believes that we premise Hasty and Sherman's personal involvement entirely on these Defendants' alleged review of the visual search log, see Dissenting Op., *post* at 90, that assertion is incorrect. As discussed, Plaintiffs have plausibly alleged that Hasty ordered the development of, and that he and Sherman approved and implemented, the challenged strip-search policy. Plaintiffs' allegations regarding the visual search log only buttress the inference of Hasty's personal involvement.

[44] Although the dissent correctly notes that *Hodges* was decided before the Supreme Court's opinion in *Turner*, see Dissenting Op., *post* at 88, we have ratified *Hodges* in subsequent strip search case law. See *Hasty*, 490 F.3d at 172; *N.G.* v. *Connecticut*, 382 F.3d 225, 233-34 (2d Cir. 2004). Similarly, we reject the dissent's attempt to confine *Hodges* to its facts, only finding the absence of a legitimate penologi-

With respect to Zenk, however, the MDC Plaintiffs fail to state a plausible Fourth Amendment claim. As noted earlier, Plaintiffs do not assert any claim against Zenk for injuries they suffered prior to the date on which he became Warden of the MDC, which was April 22, 2002. Only two Plaintiffs, Benatta and Hammouda, were still detained at the MDC as of that date. These Plaintiffs have not sufficiently alleged that they were unlawfully strip searched during the period in which Zenk was Warden of the MDC.

C. Qualified Immunity

Hasty and Sherman are not entitled to qualified immunity on the MDC Plaintiffs' strip search claim. With respect to the first prong of the qualified immunity analysis, Plaintiffs have plausibly alleged that Hasty and Sherman each violated the MDC Plaintiffs' rights under the Fourth Amendment. With regard to the second prong of the inquiry, Plaintiffs' Fourth Amendment rights were clearly established at the time of the searches at issue.

In *Hasty*, we denied Hasty qualified immunity on the plaintiff's Fourth Amendment claim, stating that in the wake of 9/11 "it was clearly established that even the standard most favorable to prison officials required that strip and body-cavity searches be rationally related to le-

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cal purpose where the strip searches are "*immediately* successive." Dissenting Op., *post* at 88 (emphasis added). Like previous panels, we read *Hodges* as holding that a search may be unnecessary and purposeless where "there was no possibility that [the plaintiff] could have obtained and concealed contraband." 712 F.2d at 35; see also *N.G.*, 382 F.3d at 233-34. Here, consistent with *Hodges*, Plaintiffs have plausibly alleged that they were strip searched when there was no opportunity to acquire contraband, including in instances where they were shackled and under escort, or were never permitted to leave their cells.

gitimate government purposes." 490 F.3d at 172; see also *id.* at 159-60 (the "right not to be needlessly harassed and mistreated in the confines of a prison cell by repeated strip and body-cavity searches" was "clearly established prior to 9/11, and . . . remained clearly established even in the aftermath of that horrific event"). Because the MDC Plaintiffs' claim here is substantially the same as the Fourth Amendment claim at issue in *Hasty*, we are bound by that decision and thus deny Hasty and Sherman qualified immunity on the Fourth Amendment claim in this case.

Accordingly, we affirm the district court's denial of Hasty and Sherman's motions to dismiss the MDC Plaintiffs' Fourth Amendment strip search claim, and reverse the district court's denial of Zenk's motion to dismiss this claim.

VI. Claim 7: Conspiracy Under 42 U.S.C. § 1985

Plaintiffs' final claim is that Defendants conspired to deprive them of their rights in violation of 42 U.S.C. § 1985(3).

A. Applicable Legal Standard

A conspiracy claim under Section 1985(3) has four elements: "(1) a conspiracy, (2) for the purpose of depriving any person or class of persons of the equal protection of the laws or of equal privileges and immunities under the laws, (3) an act in furtherance of the conspiracy, and (4) whereby a person is injured in his person or property or deprived of a right or privilege of a citizen." *Hasty*, 490 F.3d at 176.[45] In addition, this claim requires that "there

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[45] Section 1985(3) of Title 42 of the United States Code provides, in pertinent part, that:

> If two or more persons in any State or Territory conspire . . . for the purpose of depriving, either directly or indirectly, any

must be some racial, or perhaps otherwise class-based, invidiously discriminatory animus behind the conspirators' action." *Griffin* v. *Breckenridge*, 403 U.S. 88, 102 (1971); accord *Reynolds* v. *Barrett*, 685 F.3d 193, 201-02 (2d Cir. 2012).

B. The Sufficiency of the Allegations

In this case, the MDC Plaintiffs have sufficiently alleged that Ashcroft, Mueller, and Ziglar met regularly and eventually agreed to subject the detainees to the challenged conditions of confinement by merging, and complying with the merger of, the New York List. The MDC Plaintiffs have also plausibly alleged that the DOJ Defendants' actions with respect to the New York List merger were based on the discriminatory animus required for a Section 1985(3) conspiracy claim, as we conclude above in our analysis of the equal protection claim. With respect to Hasty and Sherman, their joint approval of the false document without performing the requisite individualized assessment supports the reasonable inference that these two Defendants came to an agreement to and did subject Plaintiffs to harsh conditions of confinement based on the discriminatory animus required by Section 1985(3).

Plaintiffs also allege an agreement, albeit not an explicit one, among the DOJ Defendants and Hasty and Sherman to effectuate the harsh conditions of confinement with discriminatory intent. Such a tacit agreement

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person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; . . . if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, . . . the party so injured or deprived may have an action for the recovery of damages occasioned by such injury or deprivation, against any one or more of the conspirators.

can suffice under Section 1985(3). See *Webb* v. *Goord*, 340 F.3d 105, 110-11 (2d Cir. 2003). The Complaint asserts that the conditions of confinement at the MDC "were formulated in consultation with the FBI." Compl. ¶65. In addition, Hasty ordered, and Hasty and Sherman approved and implemented, the conditions of confinement "[t]o carry out Ashcroft, Mueller[,] and Ziglar's unwritten policy to subject the 9/11 detainees to harsh treatment." *Id.* ¶75; see also *id.* ¶68. The foregoing allegations are sufficient to support the reasonable inference that the DOJ Defendants, Hasty, and Sherman shared such a tacit understanding about carrying out the unlawful conduct with respect to the MDC Plaintiffs' detention.

Accordingly, the MDC Plaintiffs' allegations state a plausible claim for a Section 1985(3) conspiracy against Ashcroft, Mueller, Ziglar, Hasty, and Sherman.

C. The Intracorporate Conspiracy Doctrine

The MDC Defendants argue that they are legally incapable of conspiring with each other, and with the DOJ Defendants, because they are all part of the same governmental entity—the DOJ. In *Girard* v. *94th Street & Fifth Avenue Corp.*, 530 F.2d 66, 70-72 (2d Cir. 1976), we recognized that the defendants—officers and directors of a single corporation, and the corporation itself—could not legally conspire with one another in violation of Section 1985(3). We reached that conclusion because the defendants formed a "single business entity with a managerial policy implemented by the one governing board." *Id.* at 71. Thus, the defendants could not satisfy the statutory requirement of a conspiracy between two or more persons. *Id.* We also noted, however, that where various entities in a single institution have "disparate responsibilities and functions," a conspiracy claim could lie because

the actions of those entities would not be "actions of only one policymaking body." *Id.*

Assuming that Defendants can ultimately invoke the intracorporate conspiracy doctrine in this case, at this stage of the litigation, we cannot conclude that Ashcroft, Mueller, Ziglar, Hasty, and Sherman acted as members of a single policymaking entity for purposes of the MDC Plaintiffs' Section 1985(3) conspiracy claim. According to the Complaint, the former Attorney General, the former Director of the FBI, the former Commissioner of the INS, and the former Warden and Associate Warden at the MDC had varied responsibilities and functions that distinguish them from the single corporate entity in *Girard*. Although Hasty and Sherman may have acted, at least in part, to implement the DOJ Defendants' policy, it is also the case that Hasty and Sherman themselves established policies at the MDC. Thus, factual questions about how disparate or distinct Defendants' functions were, and how policy was created by the various Defendants, preclude us from deciding as a matter of law that Defendants resemble the single policymaking body of a corporation.[46]

D. Qualified Immunity

The DOJ Defendants, Hasty, and Sherman are not entitled to qualified immunity on this claim. First, the

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[46] We note that the BOP and, therefore, the MDC, are subject to the supervision of the Attorney General. See 18 U.S.C. § 4041. We have also found one unpublished district court decision that concludes that the Attorney General and employees of a BOP facility cannot conspire together under Section 1985. See *Chesser* v. *Walton*, No. 12-cv-01198-JPG, 2013 WL 1962285, at *3 (S.D. Ill. May 10, 2013). However, for the reasons stated above, neither this statutory provision nor district court case satisfy us that Defendants here were sufficiently similar to the members of a single corporate policymaking body such that the intracorporate conspiracy doctrine should apply.

MDC Plaintiffs have plausibly alleged a Section 1985(3) conspiracy claim against these Defendants. In addition, as we concluded in *Hasty*, in the wake of the 9/11 attacks, "even without a definitive ruling from this Court on the application of section 1985(3) to federal officials, federal officials could not reasonably have believed that it was legally permissible for them to conspire with other federal officials to deprive a person of equal protection of the laws." 490 F.3d at 177. In that case, we denied the defendants qualified immunity on the Section 1985(3) claim. See *id.* Given the sufficiency of the allegations in this case, our qualified immunity decision in *Hasty* controls here.

Accordingly, we reverse the district court's dismissal of the Section 1985(3) claim against the DOJ Defendants and affirm the denial of Hasty and Sherman's motions to dismiss this claim. Because the MDC Plaintiffs fail to adequately plead that Zenk acted with discriminatory animus, we reverse the denial of Zenk's motion to dismiss the conspiracy claim. This claim is also dismissed with respect to the Passaic Plaintiffs, as they fail to adequately plead that Defendants acted with the requisite discriminatory animus.

VII. Final Thoughts

If there is one guiding principle to our nation it is the rule of law. It protects the unpopular view, it restrains fear-based responses in times of trouble, and it sanctifies individual liberty regardless of wealth, faith, or color. The Constitution defines the limits of the Defendants' authority; detaining individuals as if they were terrorists, in the most restrictive conditions of confinement available, simply because these individuals were, or appeared to be, Arab or Muslim exceeds those limits. It might well be that national security concerns motivated the Defendants

to take action, but that is of little solace to those who felt the brunt of that decision. The suffering endured by those who were imprisoned merely because they were caught up in the hysteria of the days immediately following 9/11 is not without a remedy.

Holding individuals in solitary confinement twenty-three hours a day with regular strip searches because their perceived faith or race placed them in the group targeted for recruitment by al Qaeda violated the detainees' constitutional rights. To use such a broad and general basis for such severe confinement without any further particularization of a reason to suspect an individual's connection to terrorist activities requires certain assumptions about the "targeted group" not offered by Defendants nor supported in the record. It assumes that members of the group were already allied with or would be easily converted to the terrorist cause, until proven otherwise. Why else would no further particularization of a connection to terrorism be required? Perceived membership in the "targeted group" was seemingly enough to justify extended confinement in the most restrictive conditions available.

Discovery may show that the Defendants—the DOJ Defendants, in particular—are not personally responsible for detaining Plaintiffs in these conditions. But we simply cannot conclude at this stage that concern for the safety of our nation justified the violation of the constitutional rights on which this nation was built. The question at this stage of the litigation is whether the MDC Plaintiffs have plausibly pleaded that the Defendants exceeded the bounds of the Constitution in the wake of 9/11. We believe that they have.

CONCLUSION

For the foregoing reasons, we affirm in part and reverse in part the district court's decision on Defendants' Rule 12(b)(6) motions. More specifically, we conclude that: (1) the MDC Plaintiffs have plausibly alleged a substantive due process claim against the DOJ Defendants, against Hasty with regard to both official and unofficial conditions, and against Sherman with regard to official conditions only, and these Defendants are not entitled to qualified immunity on this claim; (2) the MDC Plaintiffs have plausibly alleged an equal protection claim against the DOJ Defendants, Hasty, and Sherman, and these Defendants are not entitled to qualified immunity on this claim; (3) the free exercise claim is dismissed as to all Defendants; (4) the MDC Plaintiffs have plausibly alleged their Fourth Amendment strip search claim against Hasty and Sherman, and these Defendants are not entitled to qualified immunity on this claim; (5) the MDC Plaintiffs have plausibly alleged the Section 1985(3) conspiracy claim against the DOJ Defendants, Hasty, and Sherman, and these Defendants are not entitled to qualified immunity on this claim; and (6) the MDC Plaintiffs have not plausibly alleged any claims against Zenk. We affirm the dismissal of the claims brought by the Passaic Plaintiffs.

The Clerk of the Court is directed to enter an order consistent with these conclusions, AFFIRMING in part and REVERSING in part, and REMANDING the matter to the district court for further proceedings consistent with this opinion.

RAGGI, Circuit Judge, concurring in part in judgment and dissenting in part:

Today, our court becomes the first to hold that a *Bivens* action can be maintained against the nation's two

highest ranking law enforcement officials—the Attorney General of the United States and the Director of the Federal Bureau of Investigation ("FBI")—for policies propounded to safeguard the nation in the immediate aftermath of the infamous al Qaeda terrorist attacks of September 11, 2001 ("9/11").[1] I respectfully dissent from this extension of *Bivens* to a context not previously recognized by Supreme Court or Second Circuit precedent. I do not suggest that executive action in this, or any other, context is not subject to constitutional constraints. I conclude only that when, as here, claims challenge official executive policy (rather than errant conduct by a rogue official—the typical *Bivens* scenario), and particularly a national security policy pertaining to the detention of illegal aliens in the aftermath of terrorist attacks by aliens operating within this country, Congress, not the judiciary, is the appropriate branch to decide whether the detained aliens should be allowed to sue executive policymakers in their individual capacities for money damages.

Even if a *Bivens* action were properly recognized in this context—which I submit it is not—I would still dissent insofar as the majority denies qualified immunity to five former federal officials, Attorney General John Ashcroft, FBI Director Robert Mueller, Immigration and Naturalization Service ("INS") Commissioner James Ziglar ("DOJ Defendants"), Metropolitan Detention Center ("MDC") Warden Dennis Hasty, and Associate War-

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[1] To date, four Courts of Appeals—for the Fourth, Seventh, Ninth, and D.C. Circuits—have declined to extend *Bivens* to suits against executive branch officials for national security actions taken after the 9/11 attacks. See *Vance* v. *Rumsfeld*, 701 F.3d 193 (7th Cir. 2012) (en banc); *Mirmehdi* v. *United States*, 689 F.3d 975 (9th Cir. 2012); *Doe* v. *Rumsfeld*, 683 F.3d 390 (D.C. Cir. 2012); *Lebron* v. *Rumsfeld*, 670 F.3d 540 (4th Cir. 2012); see also *Ali* v. *Rumsfeld*, 649 F.3d 762 (D.C. Cir. 2011); *Rasul* v. *Myers*, 563 F.3d 527 (D.C. Cir. 2009).

den James Sherman ("MDC Defendants"), on plaintiffs' policy-challenging claims of punitive and discriminatory confinement and unreasonable strip searches. The majority does narrow these claims by allowing their pursuit only (1) by those aliens confined in the MDC's most restrictive housing unit, the "ADMAX SHU" ("MDC Plaintiffs"); and (2) for restrictive confinement after defendants purportedly learned that plaintiffs were being detained without individualized suspicion of their connection to terrorism. See Majority Op., *ante* at 41-42, 77. Even with the claims so narrowed, however, I think defendants are entitled to qualified immunity because plaintiffs fail to plead plausible policy-challenging claims that were clearly established at law in the period September 2001 to April 2002, when one or more MDC Plaintiffs were confined in the ADMAX SHU. As the majority acknowledges, the 9/11 attacks killed 3,000 people and presented "unrivaled challenges and severe exigencies" for the security of the nation. Majority Op., *ante* at 31. The law did not then clearly alert federal authorities responding to these challenges that they could not hold lawfully arrested illegal aliens—identified in the course of the 9/11 investigation and among the group targeted for recruitment by al Qaeda—in restrictive (as opposed to general) confinement pending FBI-CIA clearance of any ties to terrorism unless there was prior individualized suspicion of a terrorist connection. Indeed, I am not sure that conclusion is clearly established even now.

Accordingly, because I conclude both that a *Bivens* remedy should not be extended to plaintiffs' policy-challenging claims and that the DOJ and MDC defendants are entitled, in any event, to qualified immunity, I

dissent from the majority's refusal to dismiss these claims.[2]

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[2] In concluding its opinion, the majority asserts that plaintiffs' claims cannot be dismissed because "[i]f there is one guiding principle to our nation it is the rule of law." Majority Op., *ante* at 106. The rule of law, however, is embodied not only in amendments to the Constitution, but also, and first, in that document's foundational structure of separated powers. See 1 Annals of Cong. 581 (1789) (reporting Madison's statement in first Congress that "if there is a principle in our Constitution, indeed in any free Constitution, more sacred than another, it is that which separates the Legislative, Executive, and Judicial powers"); see also Mass. Const. of 1780, Part the First, art. XXX (John Adams) (separating powers "to the end it may be a government of laws, and not of men"); *Bowsher* v. *Synar*, 478 U.S. 714, 721-22 (1986) (observing that "declared purpose of separating . . . powers of government, of course, was to 'diffus[e] power the better to secure liberty,'" (quoting *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U.S. 579, 635 (1952) (Jackson, J., concurring))). Thus, it is the rule of law that demands that a court do more than identify a possible wrong; it must consider what authority the judiciary has to imply a remedy—specifically, a damages remedy—in the absence of legislative action. See *The Federalist No. 47*, at 251-52 (James Madison) (Carey & McClellan, ed. 2001) (quoting Montesquieu's maxim that "were the power of judging joined with the legislative, the life and liberty of the subject would be exposed to arbitrary control, for the judge would then be the legislator"); *INS* v. *Chadha*, 462 U.S. 919, 951 (1983) (stating that "hydraulic pressure inherent within each of the separate Branches to exceed the outer limits of its power, even to accomplish desirable objectives, must be resisted"); J. Harvie Wilkinson III, *Our Structural Constitution*, 104 Colum. L. Rev. 1687, 1707 (2004) (observing that "threshold question" for judge is not, "How should I resolve this case?" but "To whom does the Constitution entrust the resolution of this issue?").

It is also the rule of law—to which both sides in a lawsuit have a right—that requires a court to consider whether certain defenses, such as qualified immunity, shield a particular defendant in any event from a suit for damages. See, *e.g.*, *Pearson* v. *Callahan*, 555 U.S. 223, 231-32 (2009) (reiterating that qualified immunity should be decided at earliest possible stage of litigation because it is immunity from suit, not just liability).

I. *Bivens* Should Not Be Extended To Plaintiffs' Policy-Challenging Claims

A. The Narrow Scope of *Bivens* Actions

On three occasions in the decade between 1971 and 1980, the Supreme Court implied directly from the Constitution private damages actions against federal officials for alleged violations of rights. See *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971) (implying action for unlawful arrest and excessive force in arrest from Fourth Amendment prohibition of unreasonable searches and seizures); accord *Carlson* v. *Green*, 446 U.S. 14 (1980) (implying action for deliberate indifference to prisoner's medical needs from Eighth Amendment prohibition of cruel and unusual punishment); *Davis* v. *Passman*, 442 U.S. 228 (1979) (implying action for sex discrimination in federal employment from equal protection component of Fifth Amendment). The Court has never done so again. Instead, it has "consistently refused to extend *Bivens* liability to any new context or new category of defendants," *Correctional Servs. Corp.* v. *Malesko*, 534 U.S. 61, 68 (2001), emphasizing that "implied causes of actions are disfavored," *Ashcroft* v. *Iqbal*, 556 U.S. 662, 675 (2009), and "in most instances . . . unjustified," *Wilkie* v. *Robbins*, 551 U.S. 537, 550 (2007).

This reluctance to extend *Bivens* is grounded in our constitutional structure of separated powers. As the Supreme Court has explained, deciding whether to extend *Bivens* focuses not on "the merits of the particular remedy" sought, but on "who should decide whether such a

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Thus, the rule of law animates this dissent no less than the majority opinion.

remedy should be provided," specifically, the legislative branch of government, Congress, or the adjudicative branch, the judiciary. *Bush* v. *Lucas*, 462 U.S. 367, 380 (1983). For more than thirty years now, the Supreme Court has invariably answered that question in favor of Congress. See, *e.g.*, *Wilkie* v. *Robbins*, 551 U.S. at 562 ("'Congress is in a far better position than a court to evaluate the impact of a new species of litigation' against those who act in the public's behalf." (quoting *Bush* v. *Lucas*, 462 U.S. at 389)).

Heeding this precedent, our own court, en banc, has stated "that the *Bivens* remedy is an extraordinary thing that should rarely if ever be applied in new contexts." *Arar* v. *Ashcroft*, 585 F.3d 559, 571 (2d Cir. 2009) (en banc) (internal quotation marks omitted). Most particularly, it should not be applied in a new context if any alternative process is available to address the claimed constitutional interest or if "special factors" counsel hesitation in recognizing a new damages action. *Bush* v. *Lucas*, 462 U.S. at 378; accord *Minneci* v. *Pollard*, 132 S. Ct. 617, 621 (2012); *Wilkie* v. *Robbins*, 551 U.S. at 550; *Arar* v. *Ashcroft*, 585 F.3d at 572 (collecting cases). In short, a *Bivens* remedy is never "an automatic entitlement"; it "has to represent a judgment about the best way to implement a constitutional guarantee." *Wilkie* v. *Robbins*, 551 U.S. at 550.

Applying these principles here, I conclude that plaintiffs' constitutional challenges to an alleged executive policy for confining lawfully arrested illegal aliens in the aftermath of the 9/11 attacks cannot pass the stringent test for recognizing a *Bivens* action. In holding otherwise, the panel majority maintains that plaintiffs' challenges to the conditions of their confinement—with the exception of their Free Exercise challenge—"stand[ ] firmly within

a familiar *Bivens* context," thus avoiding the need to consider factors counseling hesitation or alternative remedies. Majority Op., *ante* at 31-32, 35-36.[3] The majority can reach that conclusion, however, only by fashioning a new standard for construing the few recognized *Bivens* contexts that employs an impermissibly "high level of generality." *Wilkie* v. *Robbins*, 551 U.S. at 561 (cautioning against such construction); accord *Arar* v. *Ashcroft*, 585 F.3d at 572. I respectfully disagree with that analysis.[4]

B. Plaintiffs' Claims Do Not Arise in an Established *Bivens* Context

1. *The* Arar *v.* Ashcroft *Standard for Identifying* Bivens *Context Is Holistic and Cannot Be Reduced to Two Factors*

In deciding whether a claim arises in a previously recognized *Bivens* context, this panel is bound by our court's en banc decision in *Arar* v. *Ashcroft*, which defines "context" as "a potentially recurring scenario that has similar

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[3] I concur in the panel judgment dismissing plaintiffs' Free Exercise challenge. See Majority Op., *ante* at 35-36. Not only has the Supreme Court consistently declined to extend a *Bivens* remedy to a First Amendment claim in *any* context, see, *e.g.*, *Ashcroft* v. *Iqbal*, 556 U.S. 662, 675 (2009), but also Congress has provided alternative relief under the Religious Freedom Restoration Act, see 42 U.S.C. § 2000bb *et seq.*

[4] I dissent from the majority's allowance of *Bivens* claims against *both* the DOJ and the MDC Defendants even though the former group, having secured dismissal on other grounds in the district court, did not renew their *Bivens* challenge in defending that judgment on appeal. No matter. We can affirm on any ground supported by the record, see *Lutes Co.* v. *Hon Hai Precision Indus. Co.*, 753 F.3d 395, 413 (2d Cir. 2014), and the lists-merger theory on which the majority reverses dismissal was never advanced by plaintiffs' in either the district court or on appeal, see *infra* at 43 n.28.

legal and factual components." 585 F.3d at 572. The majority pays lip service to this definition, see Majority Op., *ante* at 29, but then significantly narrows it to demand commonality only as to the "rights injured" and the "mechanism of injury," *id.* at 32. This substitution cannot be reconciled with controlling precedent.

Arar's definition of context is unqualified, contemplating a careful, holistic examination of all legal and factual components of the "scenario" in which a claim arises to see if it is, indeed, a recurrent example of a previously recognized *Bivens* context. *Arar* v. *Ashcroft*, 585 F.3d at 572. Such an inquiry does not denominate any particular factors—such as the "rights injured" or "mechanism of injury"—as determinative. Nor does it pronounce other factors—such as a challenge to an executive policy, implicating the exercise of national security and immigration authority in a time of crisis—irrelevant.[5] By doing both here, the majority not only fails to conduct the full inquiry mandated by *Arar*'s definition of context. It also fails to heed the Supreme Court admonition that animates the *Arar* definition, *i.e.*, that a *Bivens* remedy—generally "disfavored," *Ashcroft* v. *Iqbal*, 556 U.S. at 675, and usually "unjustified," *Wilkie* v. *Robbins*, 551 U.S. at 550—is never "an automatic entitlement" but, rather, the product of a considered "judgment about the best way to implement a constitutional guarantee" in particular circumstances, *id.* Such a judgment necessarily requires

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[5] In pronouncing the national security challenges following the 9/11 attacks irrelevant to a *Bivens* context determination, the majority cites *Iqbal* v. *Hasty*, 490 F.3d 143 (2d Cir. 2007), rev'd in part sub nom. *Ashcroft* v. *Iqbal*, 556 U.S. 662 (2009). See Majority Op., *ante* at 31. That reliance is misplaced because it conflates the question of clearly established *rights*—the qualified immunity concern at issue in *Iqbal* v. *Hasty*, 490 F.3d at 159—with the distinct *Bivens* question of previously established context.

more than the general identification of a constitutional right or a mechanism of injury. It demands consideration of all factors counseling for and against an implied damages action in the specific legal and factual circumstances presented.

It is precisely because a *Bivens* judgment is made only after weighing all factors relevant to a given scenario that, when another case arises presenting similar legal and factual components, a court need not repeat the process. But where a proposed *Bivens* claim presents legal and factual circumstances that were not present in an earlier *Bivens* case, a new assessment is necessary because no court has yet made the requisite "judgment" that a judicially implied damages remedy is "the best way" to implement constitutional guarantees in that context. *Wilkie* v. *Robbins*, 551 U.S. at 550.

That is the concern here. No court has ever made the judgment that an implied damages remedy is the best way to implement constitutional guarantees of substantive due process, equal protection, and reasonable search when lawfully arrested illegal aliens challenge an executive confinement policy, purportedly made at the cabinet level in a time of crisis, and implicating national security and immigration authority. In the absence of a judgment made in *that* context, the majority cannot conclude that a *Bivens* remedy is available to these plaintiffs simply because they assert rights and mechanisms of injury present in some other *Bivens* cases. Indeed, because rights and mechanisms of injury can arise in a variety of circumstances, presenting different legal and factual components, these two factors cannot alone identify context except at an impermissibly high level of generality. See *Wilkie* v. *Robbins*, 551 U.S. at 561; *Arar* v. *Ashcroft*, 585 F.3d at 572.

This generality concern is only exacerbated by the majority's apparent willingness to mix and match a "right" from one *Bivens* case with a "mechanism of injury" from another and to conclude that wherever such a right and such a mechanism of injury are paired together, the resulting *Bivens* claim arises in an established context. See Majority Op., *ante* at 31-35; 37. The problem is that no court has previously made the requisite judgment with respect to that pairing, much less made it in a legal and factual scenario similar to the one presented here.

2. *The Majority Cites No Case Affording a* Bivens *Remedy in a Scenario Legally and Factually Similar to that Presented Here*

a. *Punitive Confinement Claim*

The majority cites two cases, *Carlson* v. *Green*, 446 U.S. 14, and *Thomas* v. *Ashcroft*, 470 F.3d 491 (2d Cir. 2006), in which federal prisoners were allowed to maintain *Bivens* actions for injuries sustained in confinement. See Majority Op., *ante* at 32-33. But in each case, the claim asserted was deliberate indifference to the prisoner's particular medical needs. That scenario is neither legally nor factually similar to a substantive due process claim of punitive pre-trial confinement implied from allegedly purposeless restrictions. See generally *Bell* v. *Wolfish*, 441 U.S. 520 (1970).[6] Indeed, the difference in context is only highlighted by law affording prison authorities considerable discretion in establishing confinement policies. See generally *Florence* v. *Bd. of Chosen Freeholders*, 132 S. Ct. 1510, 1517 (2012).

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[6] When, in *Bell* v. *Wolfish*, the Supreme Court discussed the substantive due process prohibition on punitive pre-trial confinement, it did so on a petition for a writ of habeas corpus, not in a *Bivens* action. See 441 U.S. at 526, 528.

Deliberate indifference to an individual inmate's particular health needs was also the basis for the constitutional claim in *Correctional Services Corp.* v. *Malesko*, 534 U.S. 61. In that case, however, the Supreme Court declined to extend a *Bivens* remedy to such a claim when brought against a private corporation operating detention facilities under a contract with the Bureau of Prisons ("BOP"). See *id.* at 74. Thus, the *Malesko* observation cited by the majority—that "[i]f a federal prisoner in a BOP facility alleges a constitutional deprivation, he may bring a *Bivens* claim against the offending individual officers, subject to the defense of qualified immunity," Majority Op., *ante* at 33 (quoting *Malesko*, 534 U.S. at 72)—cannot be read apart from the context in which it was made. It would, in fact, be extraordinary to conclude that in a deliberate indifference case such as *Malesko*, in which all claims against individuals had been dismissed, and in which the Supreme Court declined to extend *Bivens* to the private corporate defendant, the Court was, nevertheless, using a single sentence of *dictum* to sweep well beyond *Carlson* and to hold that *Bivens* remedies are available to federal prisoners raising any constitutional challenge to any aspect of their confinement against individual federal employees. Indeed, that reading is foreclosed in this circuit by *Arar*, which observed that *Carlson* extended *Bivens* to Eighth Amendment violations by prison officials, after which "the Supreme Court has declined to extend the *Bivens* remedy in any new direction *at all*." *Arar* v. *Ashcroft*, 585 F.3d at 571 (emphasis added).

In *Tellier* v. *Fields*, also cited by the majority, *ante* at 34, a prison inmate did seek a *Bivens* remedy for restrictive confinement, but the right he asserted was *procedural* not *substantive* due process. See 280 F.3d 69, 73

(2d Cir. 2001). In short, he complained that defendants had failed to follow controlling procedures for imposing prison discipline. He did not contend that the restrictive conditions themselves were substantively unreasonable, a claim with quite different legal and factual components.[7]

In sum, the panel majority points to no case in which the Supreme Court or this court has yet extended a *Bivens* remedy to claims of punitive confinement by federal pre-trial detainees, and certainly not in the unprecedented context of a challenge to executive policy implicating the exercise of national security and immigration authority in a time of crisis.[8]

b. *Discriminatory Confinement Claim*

Nor does the majority cite to any case affording a *Bivens* remedy for alleged discriminatory conditions of

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[7] This court has already dismissed procedural due process challenges to the confinement policy here at issue on grounds of qualified immunity. See *Iqbal* v. *Hasty*, 490 F.3d at 167-68.

[8] The majority cites two cases—not controlling on this court—that allowed federal detainees to pursue a *Bivens* remedy for restrictive confinement. See *Bistrian* v. *Levi*, 696 F.3d 352, 374-75 (3d Cir. 2012); *Cale* v. *Johnson*, 861 F.2d 943, 947 (6th Cir. 1988), abrogated on other grounds by *Thaddeus-X* v. *Blatter*, 175 F.3d 378 (6th Cir. 1999 (en banc). In neither case, however, did these courts assess "context" by reference to the standard we articulated in *Arar*. In fact, *Bistrian* conducted no *Bivens* extension analysis. Much less were these other circuit courts confronted with the circumstances contributing to the unique scenario presented here.

Insofar as the majority cites the *dissenting* opinion in *Arar* for the proposition that this court has "presumed the availability of a *Bivens* remedy for substantive due process claims," Majority Op., *ante* at 32 n.15 (citing *Arar*, 585 F.3d at 598 (Sack, J., dissenting)), it is, of course, not the dissent, but the en banc majority opinion in *Arar* that controls our context consideration here. For reasons already discussed, that controlling opinion requires us to look to more than the right alleged to identify an established *Bivens* context.

confinement. The context of the single equal protection case cited, *Davis* v. *Passman*, 442 U.S. 228, was employment discrimination by a member of Congress. See Majority Op., *ante* at 32 n.15. That scenario bears almost no factual and legal similarity to the equal protection claim here, which is informed not only by the discretion afforded prison authorities in establishing confinement policies, see generally *Florence* v. *Bd. of Chosen Freeholders*, 132 S. Ct. at 1517, but also by the particular circumstances of the 9/11 attacks, see generally *Ashcroft* v. *Iqbal*, 556 U.S. at 682 (observing that because 9/11 attacks were ordered and conducted by Arab Muslims, it was "no surprise" that legitimate law enforcement policies to identify 9/11 assailants and to prevent future attacks "would produce a disparate incidental impact on Arab Muslims, even though the purpose of the policy was to target neither Arabs nor Muslims").

Even in the context of employment discrimination claims, the Supreme Court has been reluctant to construe *Davis* v. *Passman* to reach beyond its particular factual scenario, especially where factors—not present in *Davis*—counsel hesitation. See *Chappell* v. *Wallace*, 462 U.S. 296, 297-305 (1979) (declining to extend *Bivens* to enlisted soldiers' claims of race discrimination against commanding officers). If, as the majority seems to recognize, *Davis* cannot be construed to afford a *Bivens* remedy for every claim of *employment* discrimination, see Majority Op., *ante* at 32 n.15, it can hardly be understood to afford a *Bivens* remedy in the altogether different context of alleged prison confinement discrimination.

c. *Strip-Search Claim*

In challenging the strip-search component of their restrictive confinement, the MDC Plaintiffs invoke the Fourth as well as the Fifth Amendment. The Fourth

Amendment cases cited by the majority—*Bivens*, *Groh* v. *Ramirez*, 540 U.S. 551 (2004), and *Castro* v. *United States*, 34 F.3d 106 (2d Cir. 2006), see Majority Op., *ante* at 36-37—do not present scenarios similar to that here.

The potentially recurring scenario in *Bivens* was unlawful arrest, executed without probable cause and with excessive force. See 403 U.S. at 389. That hardly represents a judgment that an implied *Bivens* damages action is the best way to vindicate *every* Fourth Amendment claim. See Majority Op., *ante* at 37. Rather, to come within the context established by *Bivens*, a Fourth Amendment claim must have legal and factual components akin to unlawful arrest. See generally *Arar* v. *Ashcroft*, 585 F.3d at 572. Plaintiffs here do not challenge their arrests, which were all supported by probable cause to believe that each detained alien had violated immigration laws, and which were all effected without undue force. Instead, plaintiffs challenge a policy of restrictive confinement (including strip searches) *after* lawful arrest.

As for *Groh* and *Castro*, the searches there at issue were of private residences, a factually distinct scenario presenting different legally cognizable expectations of privacy giving rise to different legal standards of constitutional reasonableness than those applicable to prison searches. See *Covino* v. *Patrissi*, 967 F.2d 73, 75 (2d Cir. 1992) (observing, in § 1983 action, that constitutionality of pre-trial detainee strip searches should be assessed under "legitimate penological interests" standard outlined in *Turner* v. *Safley*, 482 U.S. 78, 87 (1987)); accord *Iqbal* v. *Hasty*, 490 F.3d at 172.

To summarize, I respectfully dissent from the majority's conclusion that plaintiffs' policy-challenging claims to restrictive confinement arise in a familiar *Bivens* context because (1) to the extent the majority employs a

rights-injury calculus to reach that conclusion, it construes context at an impermissibly high level of generality; and (2) no case cited by the plaintiffs or the majority has yet made the requisite judgment that a *Bivens* remedy is the best way to implement constitutional rights in a scenario with legal *and* factual components similar to those presented here. In short, the context here is "fundamentally different from anything recognized in *Bivens* or subsequent cases." *Correctional Servs. Corp.* v. *Malesko*, 534 U.S. at 70. Thus, this court must conduct the full analysis necessary to extend a *Bivens* remedy to a new context. Because the majority declines to do so, see Majority Op., *ante* at 38 n.17, I undertake that task here.

C. Factors Counseling Against Extending *Bivens* to Plaintiffs' Policy-Challenging Claims

Not only do the unique circumstances of this case not fall within an established *Bivens* context, but a number of those circumstances also counsel hesitation in extending a *Bivens* remedy here. See *Bush* v. *Lucas*, 462 U.S. at 378 (instructing courts to pay "particular heed" to "any special factors counseling hesitation before authorizing a new kind of federal litigation"); accord *Mimeci* v. *Pollard*, 132 S. Ct. at 621; *Wilkie* v. *Robbins*, 551 U.S. at 550; *Arar* v. *Ashcroft*, 585 F.3d at 573 (characterizing "special factors" as "embracing category," which includes any circumstance provoking hesitation about propriety of court entertaining damages claim in absence of congressional action). I discuss four factors in particular, the first three of which are inextricably intertwined: (1) plaintiffs challenge an official executive policy (rather than rogue action), implicating (2) the executive's immigration authority, (3) as well as its national security authority, and

(4) Congress has afforded no damages remedy to 9/11 detainees despite awareness of the concerns raised here.

1. *Official Executive Policy*

Plaintiffs challenge what they themselves characterize as an official confinement policy propounded by the nation's two highest ranking law enforcement officials, the Attorney General and the FBI Director, in response to the national security threat raised by the terrorist attacks of 9/11. Neither plaintiffs nor the panel majority identifies any case affording a *Bivens* remedy in the context of a constitutional challenge to executive branch policy, and certainly not to policy made at the cabinet level. This is not surprising. A *Bivens* action has never been considered a "proper vehicle for altering an entity's policy." *Correctional Servs. Corp.* v. *Malesko*, 534 U.S. at 74. While *Malesko* made this observation in declining to extend *Bivens* to a suit against a corporate defendant, this court has recognized en banc that it applies with equal force to claims against individuals. As we explained in *Arar* v. *Ashcroft*, allowing a private party to maintain a *Bivens* action against federal officials for "policies promulgated and pursued by the executive branch, not simply isolated actions of individual federal employees ... is without precedent and implicates questions of separation of powers as well as sovereign immunity." 585 F.3d at 578.

That admonition counsels particular hesitation here where the challenged confinement policy was purportedly propounded and maintained not by rogue actors, see *Kreines* v. *United States*, 33 F.3d 1105, 1108 (9th Cir. 1994) (stating that *Bivens* actions are generally brought "against rogue officers who step outside the scope of their official duties"), but by persons specifically charged by the President with primary responsibility for home-

land defense after 9/11." In this regard, it is worth recalling that the confinement policy here at issue was not the only action taken by the nation in response to the security exigencies presented by the 9/11 attacks. Within a week, the United States went to war.[10] Defendants Ashcroft and Mueller were among those senior officials who served as the President's "war council," and it was in that context that they were charged with homeland defense.[11] These circumstances should only add to our hesitation in judicially implying a *damages* remedy against executive officials who might well be understood to have been acting as "the hand of the president" in formulating policies responding to a national emergency.[12]

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[9] See *The 9/11 Commission Report, Final Report of the National Commission on Terrorist Attacks upon the United States* ("9/11 Report") 333 (2004), available at http://1.usa.gov/1AMXOO4 (detailing President's written assignment of responsibility for homeland security after 9/11 to Attorney General Ashcroft, FBI Director Mueller, and CIA Director George Tenet); see also Jack Goldsmith, *The Terror Presidency* 75 (2007) (recounting that, at September 12, 2001 meeting of National Security Council, President Bush told Attorney General Ashcroft, "'Don't ever let this happen again,'" a "simple sentence" that "set the tone for everything Ashcroft's Justice Department would do in the aftermath of 9/11").

[10] See Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (Sept. 18, 2001).

[11] See 9/11 Report 330 (identifying Attorney General and FBI Director, along with Vice President, Secretaries of State and Defense, Chairman and Vice-Chairman of Joint Chiefs, National Security Advisor, CIA Director, and President's Chief of Staff, as "top advisers" convened by President on night of 9/11 and subsequently denominated by him as his "war council" in responding to terrorist attacks).

[12] In *Ponzi* v. *Fessenden*, 258 U.S. 254, 262 (1922), Chief Justice (and former President) Taft described the Attorney General as "the hand of the president" in protecting United States interests in legal proceedings.

Nor is a different conclusion warranted here because subordinates of the Attorney General may have disagreed among themselves about the parameters of the challenged policy. See Majority Op., *ante* at 49.[13] As this court has recognized, a *Bivens* damages action is not the appropriate vehicle for reopening executive branch debates so that the judiciary can second-guess the final policy decision. See *Benzman* v. *Whitman*, 523 F.3d 119, 126 (2d Cir. 2008) (observing that "right of federal agencies to make discretionary decisions when engaged in disaster relief without the fear of judicial second-guessing" raises separation-of-powers concern cautioning hesitation in extending *Bivens* (internal quotation marks omitted)). The Fourth Circuit reached that same conclusion in declining to extend *Bivens* to a due process challenge to the executive's designation of enemy combatants in the war on terrorism, a matter on which the FBI and Defense Department had allegedly disagreed. See *Lebron* v. *Rumsfeld*, 670 F.3d 540 (4th Cir. 2012). In so ruling, *Lebron* observed that the claims not only intruded on "past executive deliberations affecting sensitive matters

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[13] The majority locates evidence of disagreement between the FBI and INS with respect to the MDC Plaintiffs' continued restrictive confinement in the ADMAX SHU in an OIG Report's account of a November 2, 2001 meeting. See Dep't of Justice, Office of the Inspector General, *The September 11 Detainees: A Review of the Treatment of Aliens Held on Immigration Charges in Connection with the Investigation of the September 11 Attacks* ("OIG Report") 55-56 (April 2003), available at http://1.usa.gov/1ygkjKg. This is misleading. As I explain *infra* at 52-53, the OIG Report makes plain that the disagreement voiced by FBI and INS representatives at that meeting pertained *not* to whether illegal aliens detained at the MDC should continue to be held in the ADMAX SHU, but to whether New York list detainees (housed both restrictively at the MDC and in general population at the Passaic County Jail) should continue to be held at all.

of national security," but also risked chilling frank, future policy discussions in this area "shadowed as they might be by the thought that those involved would face prolonged civil litigation and potential personal liability." *Id.* at 551.

As earlier stated, hesitation in extending *Bivens* does not suggest that federal policymakers—even those appointed by the President and of cabinet rank—are not bound by constitutional constraints. See *supra* at 1-2. It simply recognizes that where an executive policy is at issue, Congress, not the judiciary, is the branch best suited to decide whether a damages action is the appropriate vehicle for challenging that policy. See *Arar* v. *Ashcroft*, 585 F.3d at 574 (explaining that "federal system of checks and balances provides means to consider allegedly unconstitutional executive policy, but a [judicially created] private action for money damages against individual policymakers is not one of them"); see also *Vance* v. *Rumsfeld*, 701 F.3d 193, 205 (7th Cir. 2012) (en banc) (observing that "normal means to handle defective policies and regulations is a suit under the Administrative Procedure Act or an equivalent statute, not an award of damages against the policy's author").

2. *Implicating Executive's Immigration Authority*

Further removing plaintiffs' claims from any recognized *Bivens* context, and certainly counseling hesitation in extending a *Bivens* remedy, is the fact that the challenged policy implicates the executive's immigration authority. As the Supreme Court has stated—in general and not simply with respect to *Bivens*—"any policy toward aliens is vitally and intricately interwoven with contemporaneous policies in regard to the conduct of foreign relations, the war power, and the maintenance of a re-

publican form of government," matters "so exclusively entrusted to the political branches of government as to be largely immune from judicial inquiry or interference" absent congressional authorization. *Harisiades* v. *Shaughnessy*, 342 U.S. 580, 588-89 (1952); accord *Arar* v. *Ashcroft*, 585 F.3d at 570.

The majority, however, concludes that plaintiffs' immigration status is irrelevant to assessing a *Bivens* context because illegal aliens have the same rights as citizens to be free from punitive or discriminatory conditions of confinement. See Majority Op., *ante* at 35. Whatever the merits of that conclusion generally, it begs the relevant *Bivens* extension question, which is not whether the Constitution affords illegal aliens certain rights coextensive with those of citizens, but whether a judicially implied damages remedy is the best way to implement such rights when the plaintiff is an illegal alien and not a citizen. See *Wilkie* v. *Robbins*, 551 U.S. at 550; *Mirmehdi* v. *United States*, 689 F.3d 975, 981 (9th Cir. 2012) (observing that "immigrants' remedies for vindicating the rights which they possess under the Constitution are not coextensive with those afforded to citizens," and declining to extend *Bivens* to illegal alien's claim of wrongful detention pending deportation).

Even assuming that in the familiar *Bivens* contexts of false arrest or deliberate indifference, the law were to conclude that the distinction between citizens and aliens did not counsel hesitation in extending a *Bivens* remedy, that is not this case. Plaintiffs here seek to employ a *Bivens* action to challenge an executive policy for the restrictive confinement of lawfully arrested illegal aliens while the FBI and CIA determined if they had any connection to recent terrorist attacks by aliens operating in this country or if they posed a threat of future attacks.

This is hardly a familiar *Bivens* context, and such an intrusion on the executive's immigration authority counsels hesitation in denominating a judicially implied damages remedy against policymakers as the "best way" to implement constitutional guarantees in those circumstances. *Wilkie* v. *Robbins*, 551 U.S. at 550.

3. *Implicating Executive's National Security Authority*

Plaintiffs' claims also propose to inquire into—and dispute—the executive's exercise of its national security authority. Indeed, that seems to be their primary purpose. This is an unprecedented *Bivens* context strongly counseling hesitation.

To explain, plaintiffs' due process and equal protection claims require proof of defendants' specific intent, either to punish, see *Bell* v. *Wolfish*, 441 U.S. at 538, or to discriminate, see *Washington* v. *Davis*, 426 U.S. 229, 241-42 (1976). Such intent may be either express or implied. See *Brown* v. *City of Oneonta*, 221 F.3d 329, 337 (2d Cir. 2000). The majority here concludes that plaintiffs plausibly *imply* proscribed intent through allegations that the challenged confinement policy was "not reasonably related to a legitimate goal." See Majority Op., *ante* at 55-58 (citing *Bell* v. *Wolfish*, 441 U.S. at 539). It similarly concludes that plaintiffs' plausibly plead that frequent strip searches were unreasonable relative to any legitimate penological interest. See *id.* at 97.

The "legitimate goal" at issue here is national security. MDC Plaintiffs propose to prove that their confinement in the ADMAX SHU was punitive and/or discriminatory by showing that there was no real national security need to maintain them in such restrictive confinement pending FBI-CIA clearance, at least not in the absence of prior individualized suspicion that each alien posed a terrorism

threat. Plaintiffs propose to make essentially the same showing in challenging the reasonableness of the strip-search policy that accompanied restrictive confinement. Thus, the executive's exercise of national security authority, far from being irrelevant to plaintiffs' *Bivens* claims, see Majority Op., *ante* at 31, will be *the* critical focus of this litigation—and of the exhaustive discovery that will undoubtedly attend it.

The Supreme Court has never afforded a *Bivens* remedy to a party challenging the executive's exercise of its national security authority. See *Doe* v. *Rumsfeld*, 683 F.3d 390, 394 (D.C. Cir. 2012) (making observation in declining to recognize *Bivens* action). Indeed, the Court has observed—in general and not simply with respect to *Bivens*—that "[m]atters intimately related to . . . national security are rarely proper subjects for judicial intervention" in the absence of congressional authorization. *Haig* v. *Agee*, 453 U.S. 280, 292 (1981); see *Department of Navy* v. *Egan*, 484 U.S. 518, 529-30 (1988) (stating that "unless Congress specifically has provided otherwise, courts traditionally have been reluctant to intrude upon the authority of the Executive in military and national security affairs"); accord *Arar* v. *Ashcroft*, 585 F.3d at 578 (noting that intrusion on executive's national security authority raises "grave concerns about the separation of powers" dictated by the Constitution and, thus, counsels hesitation in extending *Bivens*).

Further counseling hesitation is the judiciary's limited competency to make national security assessments, see *Arar* v. *Ashcroft*, 585 F.3d at 575-78, particularly ones that could be informed by classified information, see generally *Boumediene* v. *Bush*, 553 U.S. 723, 797 (2009) (observing that federal judges do not "begin the day with briefings that may describe new and serious threats to

our Nation and its people").[14] That competency concern is only heightened here by the extensive inquiry that will be necessary to understand and assess the risk concerns reasonably informing the challenged restrictive confinement policy. At a minimum, such an inquiry would have to consider the 9/11 attacks, the al Qaeda terrorist organization that ordered them, the attacks' alien perpetrators, and how those aliens—and, therefore, similarly minded others—could operate in the United States without detection.[15] It would have to consider the history of al Qaeda attacks on American interests *prior* to 9/11,[16] as well as terrorists' frequent use of immigration fraud to conceal their murderous plans.[17] It would have to consid-

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[14] See also Goldsmith, *The Terror Presidency* 71-74 (describing "threat matrix" provided daily to President and select officials, including Attorney General and FBI Director).

[15] See, *e.g.*, 9/11 Report 227-29 (reporting how, when 9/11 hijackers Mohamed Atta and Marwan al Shehhi encountered difficulty reentering United States in January 2001 without presenting student visas, they nevertheless persuaded INS inspectors to admit them so that they could continue flight training).

[16] Previous al Qaeda attacks included (1) the 1993 World Trade Center bombing (six deaths); (2) the thwarted 1993 conspiracy to bomb New York City landmarks led by the "Blind Sheikh," Omar Abdel Rahman; (3) the thwarted 1995 plot to explode American commercial airplanes over the Pacific Ocean, led by Ramzi Yousef; (4) the 1996 bombing of an apartment complex housing United States Air Force personnel in Khobar, Saudi Arabia (19 deaths); (5) the 1998 bombings of United States embassies in Tanzania and Kenya (224 deaths); (6) the thwarted millennial bombing of Los Angeles International Airport; and (7) the 2000 bombing of the U.S.S. Cole (17 deaths). See *United States* v. *Farhane*, 634 F.3d 127, 132 n.4 (2d Cir. 2011); *In re Terrorist Bombings of U.S. Embassies in E. Africa*, 552 F.3d 93, 103-05 (2d Cir. 1998).

[17] See, *e.g.*, 9/11 Report 177-78 (discussing how conspirators in Los Angeles Airport plot followed "a familiar terrorist pattern" of using

er past life-threatening actions by Islamic terrorists while in federal custody.[18] It would have to consider events *after* 9/11—during the time when the challenged confinement policy was maintained—that fueled fears of further attacks.[19]

Hesitation is also counseled by sober recognition that national security assessments, "particularly in times of conflict, do not admit easy answers, especially not as products of the necessarily limited analysis undertaken in a single case." *Lebron* v. *Rumsfeld*, 670 F.3d at 549. This contrasts sharply with "the small number of contexts in which courts have implied a *Bivens* remedy," where it generally has "been easy to identify both the line between constitutional and unconstitutional conduct, and

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"fraudulent passports and immigration fraud to travel" in furtherance of their scheme).

[18] See, *e.g.*, *infra* at 67-68 (discussing prison actions of Omar Abdel Rahman and Mamdouh Mahmud Salim).

[19] Among these events were (1) the September 18, 2001 transmittal of anthrax in letters sent to various government and media offices, killing five, and infecting 17; (2) the mysterious November 12, 2001 crash of an American Airlines plane soon after takeoff from John F. Kennedy Airport, killing all onboard; (3) the thwarted December 22, 2001 attempt by Richard Reid to detonate a shoe bomb onboard an American Airlines plane traveling from Paris to Miami; and (4) the January 2002 kidnapping, and February 2002 beheading of *Wall Street Journal* reporter Daniel Pearl in Pakistan. Subsequent investigation would link the last two events to al Qaeda, with 9/11 mastermind Khalid Sheikh Mohammed claiming particular credit for the Pearl murder. See Peter Finn, *Khalid Sheik Mohammed killed U.S. Journalist Daniel Pearl, report finds*, Wash. Post, Jan. 20, 2011, http://wapo.st/Nyv1CX; Pam Belluck, *Threats and Responses: The Bomb Plot; Unrepentant Shoe Bomber Is Given a Life Sentence For Trying to Blow Up Jet*, N.Y. Times, Jan. 31, 2003, http://nyti.ms/ZhFZJF.

the alternative course which officers should have pursued." *Arar* v. *Ashcroft*, 585 F.3d at 580.

Here, the majority proposes to draw a line between *generally* and *restrictively* confining illegal aliens until they are cleared of terrorist connections. It concludes that general confinement raises no constitutional concerns—even though the aliens so confined were mostly Arab and Muslim. But it concludes that restrictive confinement of such aliens (at least in the absence of individualized suspicion) goes too far reasonably to relate to national security. See Majority Op., *ante* at 40-41. Setting aside the question of judicial competency to make this national security assessment, the Supreme Court has specifically cautioned against extending *Bivens* to claims that propose to show that government officials "went too far" in pursuit of a legitimate objective. *Wilkie* v. *Robbins*, 551 U.S. at 556-57. That caution is particularly apt here where, before 9/11, the executive had never had to consider whether, and how restrictively, to confine illegal aliens in the aftermath of a surprise terrorist attack by aliens operating within this country. Much less had the courts ever confronted these questions. Precedent provided no easy answer—and certainly no easy negative answer—to whether it "reasonably related" to national security to hold lawfully arrested illegal aliens in restrictive confinement, at least until the FBI and CIA cleared them of terrorist connections. The law does not, after all, invariably demand individualized suspicion to support the restrictive confinement of lawfully arrested persons to ensure security, a point I discuss further *infra* at 62-63, and with which the majority agrees. See *Bell* v. *Wolfish*, 441 U.S. at 560-62; accord *Florence* v. *Bd. of Chosen Freeholders*, 132 S. Ct. at 1523; *Whitley* v. *Albers*, 475

U.S. 312, 316 (1986); *Block* v. *Rutherford*, 468 U.S. 576, 577 (1984); see also Majority Op., *ante* at 58 n.31.

Where plaintiffs' policy-challenging claims thus turn on a "reasonably related" inquiry implicating national security decisions made within "a complex and rapidly changing legal framework beset with critical legal judgments that have not yet been made, as well as policy choices that are by no means easily reached," we not only confront a new *Bivens* context, but also one strongly counseling hesitation. *Arar* v. *Ashcroft*, 585 F.3d at 575, 580 (declining to extend *Bivens* to claim requiring "inquiry into the perceived need for the [challenged] policy, the threats to which it responds, the substance and sources of the intelligence used to formulate it, and the propriety of adopting specific responses to particular threats").

Again, this does not mean that executive detention and confinement decisions implicating national security are insulated from judicial review. The Constitution's guarantee of habeas corpus ensures against that. See *Boumediene* v. *Bush*, 553 U.S. at 771; *Hamdi* v. *Rumsfeld*, 542 U.S. 507, 525, 533 (2004); see also *Bell* v. *Wolfish*, 441 U.S. at 526. But the fact that the Constitution expressly affords a liberty-safeguarding remedy against the sovereign even when national security concerns are present is hardly an invitation to the judiciary to imply a damages remedy against individual executive officials in these circumstances. See *Lebron* v. *Rumsfeld*, 670 F.3d at 550 (drawing distinction). Such a decision is more properly made by the legislative rather than the adjudicative branch of government.[20]

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[20] Were Congress to afford compensatory relief in the circumstances at issue, it is hardly obvious that it would place the burden on indi-

Thus, where, as here, plaintiffs urge this court to imply a damages action where none has been provided by Congress so that persons unlawfully in this country can challenge executive policy relating to national security in a time of crisis, a proper regard for separation of powers counsels hesitation in judicially extending *Bivens* to that new context. Indeed, I would decline to extend *Bivens* to plaintiffs' policy-challenging claims for this reason alone. There is, however, yet one further factor counseling hesitation.

4. *Congress's Failure to Provide a Damages Remedy*

The judiciary will not imply a *Bivens* action where Congress itself "has provided what it considers adequate remedial mechanisms for constitutional violations." *Schweiker* v. *Chilicky*, 487 U.S. 412, 423 (1988). Even where a congressionally prescribed remedy is lacking, however, courts will hesitate to extend *Bivens* to a new context where there is reason to think Congress's inaction is not "inadvertent." *Id.*; accord *Dotson* v. *Griesa*, 398 F.3d 156, 167 (2d Cir. 2005). That conclusion is warranted here, where Congress has not provided a damages remedy to post-9/11 detainees despite its awareness that (1) DOJ was arresting and detaining illegal aliens as part of its response to 9/11, (2) DOJ might press hard against constitutional bounds in its efforts to safeguard national

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vidual officials rather than the sovereign on whose behalf they acted. See generally John Paul Stevens, *Reflections About the Sovereign's Duty to Compensate Victims Harmed by Constitutional Violations, Lawyers for Civil Justice Membership Meeting* ("Stevens Reflections") 11 (May 4, 2015), available at http://1.usa.gov/1lh51e4 (proposing that "sovereign, rather than its individual agents," compensate any persons whose rights were violated in course of 9/11 investigation).

security, and (3) concerns had arisen pertaining to the detention of Arab and Muslim aliens.

As to the first point, Attorney General Ashcroft and FBI Director Mueller (as well as other DOJ officials) repeatedly testified before Congress that the arrest of illegal aliens was part of DOJ's post-9/11 strategy against terrorism.[21]

As to the second point, when Congress enacted the PATRIOT Act in October 2001, it anticipated possible DOJ overreaching and required the Department's Inspector General to review and report semi-annually to Congress on any identified abuses of civil rights and civil liberties in fighting terrorism.[22] Indeed, it is pursuant to this legislative mandate that the Inspector General provided Congress with the very OIG Reports upon which plaintiffs rely in pleading their complaint.

As to the third point, these OIG Reports discussed concerns about the treatment of confined Arab and Muslim aliens, and Congress's attention to these concerns is

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[21] See, *e.g.*, *Dep't of Justice Oversight: Preserving Our Freedoms While Defending Against Terrorism: Hearing Before the S. Comm. on the Judiciary*, 107th Cong. 312 (Dec. 6, 2001) (statement of John Ashcroft, Att'y Gen. of the United States) (explaining "deliberate campaign of arrest and detention to remove suspected terrorists who violate the law from our streets," noting that "INS has detained 563 individuals on immigration violations" and that BOP had "acted swiftly to intensify security precautions in connection with al Qaeda and other terrorist inmates," and adding that DOJ "has briefed members of the House, the Senate and their staffs on more than 100 occasions").

[22] See Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001 ("PATRIOT Act"), Pub. L. No. 107-56, § 1001, 115 Stat. 272, 391 (2001).

evident in the public record.[23] Despite its awareness of these matters, however, neither in enacting the PATRIOT Act, nor in the more than thirteen years that have now followed—during which time portions of the PATRIOT Act were reauthorized five times[24]—has Congress afforded a damages remedy to aliens who were, or in the future could be, detained in connection with terrorism investigations. We must presume that Congress was aware that alternative, albeit noncompensatory, remedies were available to challenge unconstitutional confinement, notably, habeas corpus and the "remedial mechanisms established by the BOP, including suits in federal court for injunctive relief." *Correctional Servs. Corp.* v. *Malesko*, 534 U.S. at 74 (observing that injunctive relief has long been recognized as proper means for altering unconstitutional policy); see *Bell* v. *Wolfish*, 441 U.S. at 526 (habeas corpus review).[25] Where Congress, with

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[23] See, *e.g.*, *Oversight Hearing: Law Enforcement and Terrorism: Hearing Before the S. Comm. on the Judiciary*, 108th Cong. 192 (July 23, 2003) (questioning by Sen. Patrick Leahy of FBI Director Mueller about OIG report "alleging, among other things, the abuse of immigrants being held in Federal custody," particularly "Muslim and Arab immigrants being held on civil violations of our immigration laws").

[24] See Uniting and Strengthening America by Fulfilling Rights and Ensuring Effective Discipline Over Monitoring Act of 2015 ("USA FREEDOM Act"), Pub. L. No. 114-23, 129 Stat. 268 (2015); PATRIOT Sunsets Extension Act of 2011, Pub. L. No. 112-14, 125 Stat. 216 (2011); Act to Extend Expiring Provisions of the USA PATRIOT Improvement and Reauthorization Act of 2005 and Intelligence Reform and Terrorism Prevention Act of 2004 until February 28, 2011, Pub. L. No. 111-141, 124 Stat. 37 (2010); USA PATRIOT Act Additional Reauthorizing Amendments Act of 2006, Pub. L. No. 109-178, 120 Stat. 278 (2006); USA PATRIOT Improvement and Reauthorization Act of 2005, Pub. L. No. 109-177, 120 Stat. 192 (2005).

[25] MDC Plaintiff Baloch was among the illegal aliens arrested in the 9/11 investigation who filed a habeas petition to challenge his con-

awareness of the concerns at issue, as well as the remedies available to address them, legislates repeatedly in an area without affording a damages remedy, there is strong reason to think that its inaction was not inadvertent and, thus, for the judiciary to hesitate before extending *Bivens* to that area. See *Klay* v. *Panetta*, 758 F.3d 369, 376 (D.C. Cir. 2014) ("If Congress has legislated pervasively on a particular topic but has not authorized the sort of suit that a plaintiff seeks to bring under *Bivens*, respect for the separation of powers demands that courts hesitate to imply a remedy."); *Lebron* v. *Rumsfeld*, 670 F.3d at 551-52 (observing that where "Congress was no idle bystander" and had "devoted extensive attention" to the concerns at issue in case but nonetheless did not create damages remedy, court could infer that "congressional inaction ha[d] not been inadvertent"); *cf. Arar* v. *Ashcroft*, 585 F.3d at 573 (stating that "complexity" of remedial immigration scheme created (and frequently amended) by Congress would ordinarily warrant "strong inference that Congress intended the judiciary to stay its hand and refrain from creating a *Bivens* action in this context").

Accordingly, insofar as plaintiffs invoke *Bivens* to challenge an official executive policy for the restrictive

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finement. See *Turkmen* v. *Ashcroft*, No. 02 CV 2307 (JG), 2006 WL 1662663, at *5 (E.D.N.Y. June 14, 2006) ("*Turkmen I*") (stating that Baloch filed habeas petition and six weeks later was transferred from ADMAX SHU to general population), aff'd in part, vacated in part, 589 F.3d 542 (2d Cir. 2009) ("*Turkmen II*"); see also OIG Report 87, 99-100, 102 (reporting other detainees' filing of habeas petitions).

The Ninth Circuit has cited the availability of a habeas remedy (and plaintiffs' pursuit of such relief) as a factor counseling hesitation in extending *Bivens* to claims of unlawful detention. See *Mirmehdi* v. *United States*, 689 F.3d at 982.

confinement and strip searching of illegal aliens in the aftermath of the 9/11 attacks, I conclude that their claims must be dismissed because a *Bivens* remedy has not been extended to such a context, and factors strongly counsel against this court doing so here. If illegal aliens should be afforded a damages remedy to challenge an executive policy implicating immigration and national security authority, that decision should be made by Congress rather than by the courts. See *Arar* v. *Ashcroft*, 585 F.3d at 580-81 ("Congress is the appropriate branch" to decide whether policy decisions "directly related to the security of the population and the foreign affairs of the country" should be "subjected to the influence of litigation brought by aliens").

II. Defendants Are Entitled to Qualified Immunity

A. The Concept of Qualified Immunity

Whether or not a *Bivens* action is available to challenge the executive policy at issue, defendants are entitled to dismissal on grounds of qualified immunity. Qualified immunity—a concept derived from common law—shields federal and state officials from claims for money damages "unless a plaintiff pleads facts showing that (1) the official violated a statutory or constitutional right, and (2) the right was 'clearly established' at the time of the challenged conduct." *Ashcroft* v. *al-Kidd*, 131 S. Ct. 2074, 2080 (2011) (quoting *Harlow* v. *Fitzgerald*, 457 U.S. 800, 818 (1982)). For law to be clearly established, it is not necessary to identify a case directly on point. But precedent must have spoken with sufficient clarity to have placed the constitutional question "beyond debate." *Id.* at 2083; accord *Carroll* v. *Carman*, 135 S. Ct. 348, 350 (2014). Put another way, the law must have made "the contours" of the asserted right "sufficiently clear that

every reasonable official would have understood that what he is doing violates that right." *Ashcroft* v. *al-Kidd*, 131 S. Ct. at 2083 (internal quotation marks omitted).

Qualified immunity affords such a broad shield to protect not simply government officials but government itself, specifically, "government's ability to perform its traditional functions." *Wyatt* v. *Cole*, 504 U.S. 158, 167 (1992). Thus, qualified immunity is afforded to ensure both that talented persons are not deterred from entering public service by the threat of crippling damages suits, see *id.*, and that those in government service act "with the decisiveness and the judgment required by the public good," *Scheuer* v. *Rhodes*, 416 U.S. 232, 240 (1974); accord *Filarsky* v. *Delia*, 132 S. Ct. 1657, 1665 (2012); *Richardson* v. *McKnight*, 521 U.S. 399, 409 (1997) (describing "unwarranted timidity" on the part of those engaged in public's business as "most important special government immunity-producing concern"); *Amore* v. *Novarro*, 624 F.3d 522, 530 (2d Cir. 2010) (recognizing that qualified immunity is animated by "concern that for the public benefit, public officials be able to perform their duties unflinchingly and without constant dread of retaliation").

Toward this end, qualified immunity serves to give public officials "breathing room to make reasonable but mistaken judgments" without fear of disabling liability. *Messerschmidt* v. *Millender*, 132 S. Ct. 1235, 1244 (2012) (internal quotation marks omitted). Indeed, the standard is sufficiently forgiving that it protects "'all but the plainly incompetent or those who knowingly violate the law.'"

Ashcroft v. *al-Kidd*, 131 S. Ct. at 2085 (quoting *Malley* v. *Briggs*, 475 U.S. 335, 341 (1986)).[26]

It is difficult to imagine a public good more demanding of decisiveness or more tolerant of reasonable, even if mistaken, judgments than the protection of this nation and its people from further terrorist attacks in the immediate aftermath of the horrific events of 9/11.[27] Whatever lessons hindsight might teach about how best to achieve this legitimate government objective within our system of laws, I cannot conclude that defendants here were plainly incompetent or defiant of established law in instituting or maintaining the challenged restrictive confinement policy. Insofar as the majority decides otherwise based on its determinations that plaintiffs have (1) plausibly pleaded violations of Fourth and Fifth Amendment rights, (2) which rights were clearly established at the time of defendants' actions, I respectfully dissent. As to the second point in particular, I think the majority defines established law at an impermissibly "high level of generality." *Id.* at 2084.

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[26] The Supreme Court's recent repeated unanimous awards of qualified immunity emphasize the narrow circumstances in which government officials may be held personally liable for their actions in suits for money damages. See, *e.g.*, *Taylor* v. *Barkes*, 135 S. Ct. 2042, 2044 (2015); *Carroll* v. *Carman*, 135 S. Ct. at 350-52; *Lane* v. *Franks*, 134 S. Ct. 2369, 2383 (2014); *Wood* v. *Moss*, 134 S. Ct. 2056, 2070 (2014); *Plumhoff* v. *Richard*, 134 S. Ct. 2012, 2023-24 (2014); *Stanton* v. *Sims*, 134 S. Ct. 3, 7 (2013).

[27] See generally Stevens Reflections 9 (advocating *absolute* immunity for "dedicated public officials"—including Ashcroft and Mueller—who, in aftermath of 9/11, were "attempting to minimize the risk of another terrorist attack," while proposing that federal government assume responsibility for compensating any persons whose rights were violated).

B. Punitive Confinement

The MDC Plaintiffs having been lawfully arrested for, but not yet convicted of, violations of federal immigration law, their confinement status was that of pretrial detainees. The Fifth Amendment guarantee of substantive due process does not permit pre-trial detainees to be subjected to confinement, or to restrictive conditions of confinement, "for the purpose of punishment." *Bell* v. *Wolfish*, 441 U.S. at 538. At the same time, due process does not preclude restrictive confinement "incident of some other legitimate government purpose." *Id.* In short, pre-trial confinement, or a condition of pre-trial confinement is not deemed "punishment" in the abstract, but only by virtue of the purpose for which it is imposed.

To maintain a punitive confinement claim, then, a pre-trial detainee must plausibly plead that a defendant imposed restrictive confinement with the specific intent to punish. See *id.* Where, as here, plaintiffs propose for such intent to be implied, they must plead facts sufficient to admit a plausible inference that the challenged conditions of their confinement were "not reasonably related to a legitimate goal" but, rather, were "arbitrary or purposeless." *Id.* at 539. The burden is significant because a reasonable relatedness inquiry is not an end in itself. Rather, it is a proxy for determining a defendant's true intent. Thus, a plaintiff does not plausibly plead punitive intent simply by alleging *some* mismatch between challenged conditions of confinement and the legitimate goal they are intended to serve. See, *e.g.*, *id.* at 558-60 (rejecting challenge to routine body cavity searches of pre-trial detainees following contact visits even though there had been only one reported attempt to smuggle contraband into facility in body cavity); accord *Block* v. *Rutherford*, 468 U.S. at 587 (rejecting lower courts' characterization

of total ban on contact visits as excessive in relation to security and other interests at stake). The mismatch must be so glaring as to make the challenged condition "arbitrary or purposeless" relative to any legitimate goal. Moreover, when the professed legitimate goal is security, the plausibility of any arbitrary or purposeless assertion must be considered in light of the "wide-ranging deference" that the law accords prison administrators in determining the conditions necessary to preserve discipline and security. *Bell* v. *Wolfish*, 441 U.S. at 547 (cautioning that courts must not depend on their own "idea of how best to operate a detention facility"); accord *Florence* v. *Bd. of Chosen Freeholders*, 132 S. Ct. at 1517; *Trammell* v. *Keane*, 338 F.3d 155, 163 (2d Cir. 2003).

Further, as the Supreme Court recently explained in rejecting an earlier discriminatory confinement challenge to the very policy here at issue, plaintiffs cannot carry their pleading burden by alleging facts that admit only a "possibility" of defendants' proscribed intent. *Ashcroft* v. *Iqbal*, 556 U.S. at 678. "[F]acts that are merely consistent with a defendant's liability . . . stop[ ] short of the line between possibility and plausibility of entitlement to relief." *Id.* (internal quotation marks omitted). This is particularly so where "more likely" legitimate explanations for defendants' actions are "obvious." *Id.* at 681-82.

1. *DOJ Defendants*

The panel majority concludes—and I agree—that plaintiffs fail plausibly to plead that the DOJ hold-until-cleared policy, as applied *ab initio* to illegal aliens arrested in the course of the FBI's 9/11 investigation, implies the DOJ Defendants' punitive intent. The "obvious" and "more likely explanation[ ]" for the policy was the government's legitimate interest in national security, specifically, in identifying and apprehending any persons con-

nected with the 9/11 terrorist attacks and in detecting and preventing future attacks. *Id.* In pursuing those goals, the DOJ Defendants were entitled to assume that subordinates would lawfully implement the hold-until-cleared policy. See Majority Op., *ante* at 40; see also *Turkmen* v. *Ashcroft*, 915 F. Supp. 2d 314, 340 (E.D.N.Y. 2013) ("*Turkmen III*").

Where I depart from the majority is in its determination that plaintiffs plausibly plead that the DOJ Defendants' legitimate national security purpose transformed to proscribed punitive intent by November 2001, when they approved merger of the FBI New York detainee list with the INS national detainee list, thereby maintaining the MDC Plaintiffs in the ADMAX SHU pending FBI-CIA clearance without individualized suspicion of these aliens' connection to terrorism. See Majority Op., *ante* at 40-42. Much less can I agree that clearly established law alerted every reasonable official that such actions violated substantive due process.[28]

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[28] Plaintiffs themselves *never* raised this lists-merger theory, either in their briefs to this court or in the district court. The majority, however, views merger of the New York and national lists as the critical event because it construes the pleadings to allege that "illegal aliens were being detained in punitive conditions of confinement in New York" with "no suggestion that those detainees were tied to terrorism except for the fact that they were, or were perceived to be Arab or Muslim." Majority Op., *ante* at 40-41. This is not apparent in the record.

For example, when MDC Plaintiff Purna Raj Bajracharya was placed in restrictive confinement, federal officials knew that, approximately two weeks before the 9/11 attacks, he had been observed videotaping a Queens building that housed both a New York FBI unit and the Queens County District Attorney's Office. See *id.* at 19. They further knew that when Bajracharya—who had lived illegally in the United States for five years—was questioned about this conduct, he falsely claimed to be a tourist. While these circumstances

First, insofar as the November 2001 lists-merger decision is the critical factor in the majority's identification of a plausible punitive confinement claim, plaintiffs fail to plead a sufficient factual basis for ascribing the merger decision to any of the three DOJ Defendants. See *Ashcroft* v. *Iqbal*, 556 U.S. at 678. Their allegations—that Attorney General Ashcroft "ordered that" New York list

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did not conclusively link Bajracharya to terrorism, no more so did Zacarias Moussaoui's pre-9/11 interest in flight simulator training for large jets. What both circumstances did provide, however, was individualized suspicion for investigating these men's ties to terrorism, which in Moussaoui's case led to his conviction for participation in the 9/11 conspiracy. See *United States* v. *Moussaoui*, 591 F.3d 263, 266 (4th Cir. 2010).

Further, New York list detainees were *not* uniformly detained in "punitive" conditions—by which I understand the majority to be referring to highly restrictive conditions of confinement rather than to the intent with which such restrictions were imposed. Much less were they so confined for no reason other than ethnicity or religion. This is evident from the fact that the vast majority of the approximately 300 persons on the New York list at the time of the merger decision were Arab or Muslim. Nevertheless, no more than 84 detainees were ever restrictively confined in the ADMAX SHU. See OIG Report 2, 22, 111. The remainder were held in general confinement at the Passaic County Jail. The designation difference appears generally to have been based on whether an arrested illegal alien was designated "high interest," "of interest," or "interest undetermined" to the 9/11 investigation. See OIG Report 18, 111 (explaining that arrested illegal aliens in first category were generally held in high security confinement at MDC, while persons in latter two categories were generally held in less restrictive confinement at Passaic County Jail). Nevertheless, because the OIG Report provides no specifics on this point, and because plaintiffs allege that some of them were detained at the MDC "even though they had not been classified 'high interest,'" Fourth Am. Compl. ¶4. I do not pursue the matter further. Rather, I proceed to explain why plaintiffs fail, even under the majority's lists-merger theory, plausibly to plead a claim for punitive (or discriminatory) confinement, much less one supported by clearly established law.

detainees "be detained until cleared and otherwise treated as 'of interest,'" and that FBI Director Mueller and INS Commissioner Ziglar "were fully informed of this decision, and complied with it," Fourth Am. Compl. ("Compl.") ¶47—are plainly not based on personal knowledge and, in fact, are belied by the very OIG Report on which they rely to support their claims, see *id.* ¶3 n.1. That report states quite clearly that it was Associate Deputy Attorney General Stuart Levey who, at the end of the November 2, 2001 meeting with FBI and INS representatives, "decided that all the detainees on the New York list would be added to the INS Custody List and held without bond." OIG Report 56. To be sure, plaintiffs profess to incorporate the OIG Report into their pleadings only to the extent it is not "contradicted" by their own allegations. Compl. ¶3 n.1. But that begs the question of whether there is sufficient factual matter—either in plaintiffs' allegations or in the OIG Report—plausibly to ascribe merger responsibility to any of the DOJ Defendants. There is not. Nothing in the OIG Report indicates that Levey's merger decision was ever ordered or endorsed by Attorney General Ashcroft, FBI Director Mueller, or INS Commissioner Ziglar, or even communicated to them.

In concluding otherwise, the majority asserts that OIG identification of Levey as the lists-merger decisionmaker does not absolve Ashcroft of responsibility because the OIG appears not to have asked Ashcroft about his role in that decision. See Majority Op., *ante* at 50. To the extent this implies OIG negligence or oversight, that hardly supplies a factual basis for inferring Ashcroft's responsibility. See *Ashcroft* v. *Iqbal*, 556 U.S. at 678. In any event, negligence is belied by the OIG's detailed 198-page, single-spaced report, which includes a careful dis-

cussion of when, how, and by whom the merger decision was made. See OIG Report 55-57; see also Compl. ¶3 n.1 (describing "well-documented" OIG Report).[29]

Nor can the majority infer Ashcroft's responsibility simply by referencing "the importance of the merger and its implications for how [Ashcroft's] lawful original [hold-until-cleared] order was being carried out." Majority Op., *ante* at 51. Not only is the assertion conclusory, but also *Ashcroft* v. *Iqbal* holds that even facts "merely consistent with a defendant's liability . . . stop[ ] short of the line between possibility and plausibility." 556 U.S. at 681-82 (internal quotation marks omitted).

Insofar as the majority maintains that the OIG Report itself provides factual support for a plausible inference that Ashcroft, not Levey, was the ultimate merger decisionmaker, the conclusion does not bear close examination. For example, the majority highlights part of the OIG Report indicating that, at the same November 2 meeting where the lists-merger question arose, an INS official questioned the need for CIA (as well as FBI) checks prior to releasing 9/11 detainees, prompting Levey to reply that he would need to check to see if "'any detainees could be released without the CIA check.'" Majority Op., *ante* at 51 (quoting OIG Report 56). The majority reasons that if this statement is construed to

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[29] The majority responds that I mistakenly treat "the OIG reports as a repository of all . . . facts" relevant to plaintiffs' claims, "measur[ing] plausibility by the absence or presence of fact-findings" in these reports. See Majority Op., *ante* at 50. Not so. It is plaintiffs who support their pleadings by incorporating the OIG Reports. And it is the majority that maintains that statements in (or in the instant example, an omission from) the OIG Report, reasonably establish the plausibility of plaintiffs' claims. I herein demonstrate only why no "factual matter" supports such a conclusion. *Ashcroft* v. *Iqbal*, 556 U.S. at 678.

suggest Levey's "lack of authority" to make a decision as to CIA checks, it plausibly "supports the conclusion that Levey . . . had to take [the question] to more senior officials." *Id.* at 51-52. The majority then quotes another part of the OIG Report indicating that, in late November, when the INS Chief of Staff asked if DOJ would reconsider the CIA check requirement, Levey was still concerned about "'chang[ing] the CIA check policy without additional input.'" *Id.* at 52 (quoting OIG Report 62). It concludes that "if Levey was not comfortable changing the CIA check policy without input from more senior officials, he certainly would not have been comfortable making the decision on his own to double the number of detainees subject to that policy in the first instance" and, therefore, it is plausible to think that he brought the question to Ashcroft. *Id.*

This reasoning is wholly speculative in assuming Levey's equal discomfort with the CIA check and merger decisions. Moreover, the majority's inference that Ashcroft was the consulted "senior official" is defeated by the very OIG Report on which it purports to rely. That report specifically identifies the person Levey consulted about continuing CIA checks: it was *not* Attorney General Ashcroft, but "David Laufman, the Deputy Attorney General's Chief of Staff." OIG Report 62. It was Laufman who advised Levey to continue the CIA checks. See *id.*[30] In its footnote acknowledgment of Laufman's role, the majority denies any intent to imply Ashcroft's responsibility for the CIA checks decision. It maintains

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[30] The majority can hardly have overlooked the OIG's identification of Laufman because it occurs in the very sentence of the Report that the majority quotes (in part) about Levey's continuing discomfort with making a CIA check decision in late November 2001. See OIG Report 62.

that "the only relevance of the CIA checks decision, period, is that Levey was not capable of making it on his own, suggesting that he also would not be able to make the list merger decision on his own." Majority Op., *ante* at 52 n.27. What the majority fails to explain, however, is how that analogy supports an inference that Ashcroft made the merger decision.

While that could end this discussion, I further note that the OIG Report does not, in fact, permit one to infer from Levey's discomfort with canceling CIA checks on his own that he must have been equally uncomfortable with making the lists-merger decision. The OIG Report expressly states that Levey made the lists-merger decision "[a]t the conclusion of the [November 2] meeting" at which the subject was first raised to him. OIG Report 56. In short, there was no delay in Levey's making of the merger decision for him to consult with Ashcroft or anyone else, leaving the majority's reasoning on this point wholly without any basis in fact.

The majority responds that because "the issue of the New York list was discovered in October 2001, . . . surely it is plausible that Levey consulted with more senior officials, including Ashcroft, *prior to* [the November 2] meeting." Majority Op., *ante* at 53 (emphasis in original). Even if this were an accurate account of events, it admits no more than a *possibility* that Levey consulted with anyone in the interim, much less that the person consulted was Ashcroft. But I do not think this account is accurate. While the OIG Report does detail an October 22, 2001 meeting at which DOJ, FBI, and INS representatives discussed "problems presented by the New York List," the critical fact omitted by the majority is that Levey was *not* in attendance. OIG Report 55. The OIG Report states that what Levey attended was a

"follow-up meeting" on November 2, 2001. It was there that he heard the competing views of the three interested entities, and made the merger decision. *Id.* at 55-56. The majority nevertheless deems it plausible that Levey learned about the October New York list discussion in advance of the November meeting because "Levey would not attend the November 2 meeting without knowing its agenda." Majority Op., *ante* at 53 n.29. This gave him "time to consult with more senior officials, *including Ashcroft*, before communicating a decision" at the November 2 meeting. *Id.* (emphasis added). Such attenuated reasoning stops well "short of the line between possibility and plausibility." *Ashcroft* v. *Iqbal*, 556 U.S. at 681-82 (internal quotation marks omitted). It is pure speculation.[31]

Thus, the pleadings, even with incorporation of the OIG Report, do not "contain sufficient factual matter" plausibly to ascribe the lists-merger decision to the DOJ

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[31] In another footnote, the majority further asserts that *Levey*'s communication with Ashcroft about the lists-merger decision, and Ashcroft's approval of the merger, find support in Ziglar's statement to the OIG that "he [*i.e.*, Ziglar] contacted the Attorney General's Office on November 7, 2001 [*i.e.*, five days after Levey had already made the merger decision], to discuss concerns about the clearance process, especially the impact of adding the New York cases to the INS Custody list." OIG Report 66. But the OIG Report makes clear that who Ziglar called was not Ashcroft himself, but his Chief of Staff, and that the person he in fact spoke with was Deputy Chief of Staff David Israelite. *Id.* at 66-67. Further, when Ziglar's quoted statement is read in the context of preceding and subsequent paragraphs, it is plain that his concerns related only to the "slow pace" of the FBI's clearance process, not to the conditions of confinement for New York list detainees held at the MDC. *Id.* These facts cannot admit a plausible inference that Ashcroft made the merger decision, much less that he made it for a punitive purpose.

Defendants. *Ashcroft* v. *Iqbal*, 556 U.S. at 678 (stating that well-pleaded facts must permit court to infer more than mere possibility of misconduct).

Second, even if plaintiffs could plausibly allege the DOJ Defendants' responsibility for the merger decision—which they cannot—plaintiffs fail to plead that these defendants thereby intended for plaintiffs to be held in the MDC's ADMAX SHU. The Complaint pleadings quoted at the start of the preceding point, see *supra* at 44-45, assert only that New York list detainees should be designated as "of interest" and held until cleared; they make no mention of any DOJ Defendant dictating aliens' continued confinement in the ADMAX SHU, or even their awareness of that result. Indeed, after merger, most New York list detainees continued to be held in general confinement at the Passaic County Jail. See OIG Report 111.

Moreover, the OIG Report's detailed discussion of the lists-merger decision gives no indication that the issue of continued restrictive—as opposed to general—confinement informed the merger decision in any way. The Report explains that INS officials opposed merger because of "how it would look when [INS] statistics regarding the number of September 11 detainees doubled overnight." OIG Report 55. The INS feared these high numbers would persist because of the time it was taking the FBI New York office to conduct clearance inquiries. The INS predicted that such delay would make it difficult for its attorneys to argue for continued detention without bail. See *id.* at 55-56.[32] Viewed in this context, the state-

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[32] At the same time that the OIG Report criticized the slow pace of FBI clearance, it acknowledged that the FBI New York office was under enormous pressure after the 9/11 attacks, both in investigating that event and in preventing future attacks. The New York of-

ment of Victor Cerda, Ziglar's Chief of Staff, explaining INS's opposition to the merger decision—"INS did not want to begin treating all the detainees on the New York list under the more restrictive INS policies applicable to September 11 detainees," OIG Report 56—can only be understood to reference the INS policy of holding *all* 9/11 detainees without bond, a restriction that it did not apply to illegal aliens generally, see *id.* at 73. In sum, the merger debate between the INS and FBI was about whether illegal aliens on the New York list should continue to be detained at all, not about the conditions of their confinement. Thus, the debate admits no inference that the merger decision—by whomever made—was motivated by a desire to subject the MDC Plaintiffs to restrictive confinement.

Third, as the district court observed in dismissing plaintiffs' punitive confinement claim against the DOJ Defendants, plaintiffs do not allege that these defendants "were even aware" of the challenged restrictive confinement conditions at the MDC. *Turkmen III*, 915 F. Supp. 2d at 340. The majority nevertheless concludes that the Complaint admits an inference of such awareness, pointing to allegations that (1) FBI Director Mueller oversaw the 9/11 investigation from FBI Headquarters, see Compl. ¶¶56-57; and (2) the DOJ Defendants "received detailed daily reports of the arrests and detentions," *id.* ¶47. See Majority Op., *ante* at 42. I respectfully submit that these allegations admit no more than a possibility that the DOJ Defendants ever learned of the particular conditions of confinement imposed by BOP officials at the

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fice had by far the most leads to pursue, in the course of which it encountered the most illegal aliens. See OIG Report 2, 22 (indicating that, of the 762 illegal aliens arrested during the 9/11 investigation nationwide through August 6, 2002, 491 were arrested in New York).

MDC—or, indeed, at any of the other facilities around the country where the 738 illegal aliens arrested in the course of the 9/11 investigation were held until cleared.

The first allegation, that FBI Director Mueller oversaw the vast 9/11 investigation from headquarters—as opposed to the investigation being run out of one or more field offices—says nothing to support an inference that Mueller would therefore have had personal knowledge as to the particular confinement conditions imposed by the BOP on MDC detainees. See *Ashcroft* v. *Iqbal*, 556 U.S. at 678 (holding that complaint must do more than plead facts "merely consistent with a defendant's liability" to cross the line from "possibility" to "plausibility"). To be sure, plaintiffs allege that the MDC Defendants formulated the challenged restrictive conditions "in consultation with the FBI." Compl. ¶65. But the FBI is an organization with more than 13,000 agents among 30,000 employees. Thus, this pleading hardly admits an inference that the FBI Director himself (much less the Attorney General or INS Commissioner) personally participated in or even knew of these consultations.

As to the second allegation highlighted by the majority, even assuming *arguendo* that it might admit an inference that the DOJ Defendants received daily reports on the number of illegal aliens detained in the 9/11 investigation, and on facts about such persons relevant to the ongoing terrorism investigation, it is pure conjecture to think that daily reports to federal authorities at this high level detailed the particular conditions of confinement under which each arrested alien was being held at the various facilities being used for that purpose. See *id.* Indeed, as the district court observed, plaintiffs themselves allege that the challenged conditions of confinement at the MDC were the "result" of the DOJ Defend-

ants' policy of holding illegal aliens until cleared, rather than a specifically approved element of that policy. *Turkmen III*, 915 F. Supp. 2d at 340 (citing Compl. ¶61).

Nor do those parts of the OIG Report cited by the majority support a different conclusion. See Majority Op., ante at 42-44. A BOP official's statement that "*the Department* [of Justice] was aware of the BOP's decision to house the September 11 detainees in high-security sections in various BOP facilities," OIG Report 19 (emphasis added), is too vague to ascribe personal awareness to the three DOJ Defendants in this case.[33] Moreover, the statement references how the BOP generally implemented the hold-under-clear policy throughout the country—which the panel concludes does not support plausible constitutional claims against these defendants. It does not reference the particular MDC restrictive confinement here at issue.

Insofar as the Attorney General's Deputy Chief of Staff recalled "one allegation of prisoner mistreatment being called to the attention of the Attorney General," *id.* at 20, a single complaint suggests rogue abuse, not the restrictive confinement *policy* at issue here. Further, the Attorney General's response was not to approve such conduct, but to call for a staff inquiry, hardly action implying punitive intent. See *id.*

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[33] Indeed, the OIG Report indicates that a number of DOJ witnesses—including Michael Chertoff, the Assistant Attorney General in charge of the Criminal Division; his Deputy Alice Fisher, who oversaw terrorism issues in the division; David Israelite, the Deputy Chief of Staff to the Attorney General; and Southern District of New York Deputy U.S. Attorney David Kelley, the lead prosecutor on the 9/11 investigation—stated that they either had "no information" or "no input" into where detainees would be held or the conditions of their confinement at the various BOP facilities. *Id.* at 20.

BOP Director Kathy Hawk Sawyer did tell the OIG of conversations she had in the weeks following 9/11 with the Deputy Attorney General's Chief of Staff, David Laufman, and the Principal Associate Deputy Attorney General, Christopher Wray, in which these men expressed "concerns about detainees ability to communicate both with those outside the facility and with other inmates," and urged the BOP to take "policies to their legal limit" to prevent such communication in order "to give officials investigating the detainees time to 'do their job.'" *Id.* at 112-13. But statements by members of the *Deputy Attorney General*'s staff admit no more than a "possibility" that the *Attorney General* himself was aware of their content. *Ashcroft* v. *Iqbal*, 556 U.S. at 678. That conclusion applies with even more force to the FBI Director or INS Commissioner. Moreover, the Laufman-Wray communications appear to have urged a communication blackout for all 9/11 detainees, not just those held at the MDC. See OIG Report 113. Thus, they cannot support an inference that the DOJ Defendants knew the particular restrictive conditions imposed in that facility. Further, it appears that the BOP lifted the communications blackout on 9/11 detainees—even at the MDC—by mid-October 2001, see *id.* at 114, which is before the November merger decision that is the majority's triggering date for a plausible claim of punitive and discriminatory confinement by MDC Plaintiffs. Thus, communications before the November merger, by persons other than the DOJ Defendants, about a condition of confinement that BOP lifted before the merger decision was made, support no inference as to what the DOJ Defendants knew about conditions of confinement at the MDC in November 2001.[34]

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[34] For the same reasons that I think pleadings related to the lists-

Fourth, even if plaintiffs' allegations were sufficient to admit an inference that the DOJ Defendants knew that, as a consequence of the lists' merger, MDC Plaintiffs would remain in restrictive confinement, that would be insufficient to imply the requisite specific intent. As the Supreme Court explained in *Ashcroft* v. *Iqbal*, "purposeful" conduct "requires more than intent as volition or intent as awareness of consequences." 556 U.S. at 681. It requires that a decisionmaker undertake a course of action "'because of,' not merely 'in spite of' the action's adverse effects." *Id.* (internal quotation marks and citation omitted). Here, the pleadings provide no factual basis to conclude that anyone made the merger decision *because* it would keep the MDC Plaintiffs in restrictive confinement.

Fifth, plaintiffs fail in any event plausibly to allege facts admitting an inference that their continued MDC restrictive confinement after November 2001 was "arbitrary or purposeless" to any legitimate objective, so that plaintiffs' real intent must have been punitive. *Bell* v. *Wolfish*, 441 U.S. at 539. That inference is, I submit, foreclosed by the "obvious" and "more likely" explanation for the challenged action: the DOJ Defendants' determination to identify and apprehend anyone involved in the 9/11 attacks and to safeguard the nation from further terrorist attacks. *Ashcroft* v. *Iqbal*, 556 U.S. at 681-82.

This non-punitive motivation is no after-the-fact invention. The Supreme Court recognized it to motivate the entire vast investigation that followed 9/11 and pursuant

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merger decision do not admit a plausible inference that the DOJ Defendants knew of the particular restrictive conditions of confinement at the MDC, I do not think they admit a plausible inference that the DOJ Defendants knew that such conditions were being imposed without individualized suspicion of terrorist connections.

to which plaintiffs were arrested and confined. See *id.* at 667 (stating that "FBI and other entities within the Department of Justice began an investigation of vast reach to identify the [9/11] assailants and prevent them from attacking anew," dedicating "more than 4,000 special agents and 3,000 support personnel to the endeavor"). The OIG Report makes the same point. See OIG Report 12-13 (noting Attorney General's directive that all components of DOJ "focus their efforts on disrupting any additional terrorist threats," and general understanding within DOJ that every available legal means should be used "to make sure that no one else was killed").

The panel majority acknowledges that national security concerns "might well" have motivated defendants' challenged actions, see Majority Op., *ante* at 106, including the merger decision on which it relies to deny dismissal to the DOJ Defendants, see *id.* at 54-55 (quoting Levey's statement to OIG that, in merging lists, "he wanted to err on the side of caution so that a terrorist would not be released by mistake," OIG Report 56). Indeed, the OIG Report specifically concludes that the merger decision "was supportable, given the desire not to release any alien who might be connected to the [9/11] attacks or [to] terrorism." OIG Report 71. Nevertheless, the majority maintains that, even if the DOJ Defendants were intent on ensuring national security, the mismatch between that object and the restrictive confinement conditions at the MDC was so great (in the absence of individualized suspicion) as to be deemed arbitrary and purposeless, admitting an inference of punitive intent. See Majority Op., *ante* at 55-58.

Whether a court, upon identifying an obvious nonpunitive intent for challenged conduct, can nevertheless allow plaintiffs to pursue a substantive due process claim

on a theory of implied punitive intent is not apparent. See, *e.g.*, *Ashcroft* v. *Iqbal*, 556 U.S. at 683 (rejecting discrimination claim in such circumstances); *Block* v. *Rutherford*, 468 U.S. at 589 (instructing that once court identifies legitimate purpose for challenged confinement policy, its inquiry should end because "further 'balancing' result[s] in an impermissible substitution of [the court's] views" for those of confining authorities). Certainly, the conclusion is not placed "beyond debate" by clearly established law, without which defendants must be afforded qualified immunity. *Carroll* v. *Carmon*, 135 S. Ct. at 350; *Ashcroft* v. *al-Kidd*, 131 S. Ct. at 2083.

In urging otherwise, the majority cites *Bell* v. *Wolfish*, 441 U.S. 520, and *Iqbal* v. *Hasty*, 490 F.3d 143. See Majority Op., *ante* at 61. *Bell* v. *Wolfish* held that if a condition of pre-trial confinement "is not reasonably related to a legitimate goal—if it is arbitrary or purposeless—a court permissibly may infer that the purpose of the government action is punishment." 441 U.S. at 539. But that simply states a "general proposition," which affords "little help in determining whether the violative nature of particular conduct is clearly established." *Ashcroft* v. *al-Kidd*, 131 S. Ct. at 2084. Moreover, because *Wolfish* itself rejected all constitutional challenges to the restrictive conditions there at issue, see 441 U.S. at 560-62, it hardly made the parameters of the substantive due process ban on punitive pre-trial confinement "sufficiently clear that every reasonable official would have understood" that the restrictive conditions here at issue were arbitrary or purposeless to ensuring national security in the absence of individualized suspicion of terrorism, *Ashcroft* v. *Al-Kidd*, 131 S. Ct. at 2083 (holding that unless law is so clearly established, official is entitled to qualified immunity).

As for *Iqbal* v. *Hasty*, this court did not there place beyond dispute the need for individualized suspicion of terrorism to place 9/11 detainees in restrictive confinement. Indeed, that case made no mention of the lack of such suspicion in observing that "[t]he right of pretrial detainees to be free from punitive restraints was clearly established at the time of the events in question, and no reasonable officer could have thought that he could punish a detainee by subjecting him to the practices and conditions alleged by the Plaintiff." *Iqbal* v. *Hasty*, 490 F.3d at 169. In fact, this statement was made in concluding that plaintiffs had adequately alleged Warden Hasty's express punitive intent. That conclusion having been reached under a pleading standard abrogated by the Supreme Court in *Ashcroft* v. *Iqbal*, 556 U.S. at 680, *Hasty*'s preclusive effect here is open to question. But even if we assume that this court there correctly concluded that the prohibition on punitive restraints is clearly established in any circumstance where a defendant acts with the *express* intent to punish, *Hasty* did not hold that the same conclusion applies in the myriad circumstances where plaintiffs propose to *imply* intent by challenging the reasonableness of a restraint relative to a legitimate objective. Certainly, *Hasty* did not hold it well established that the restrictive confinement of lawfully arrested persons without individualized suspicion of a security risk is implicitly punitive.

Meanwhile, considerable law indicates that individualized suspicion is generally *not* required to impose restrictive conditions of confinement on lawfully arrested detainees in pursuit of a legitimate security objective. *Block* v. *Rutherford*, 468 U.S. at 585-87, upheld a blanket prohibition on pre-trial detainees' contact visits, observing that the "identification of those inmates who have

propensities for violence, escape, or drug smuggling is a difficult if not impossible task," *id.* at 587. *Bell* v. *Wolfish*, 441 U.S. at 558, rejected a challenge to body cavity searches of all pre-trial detainees after contact visits even though there had been only a single past incident of contraband being concealed in a body cavity. *Whitley* v. *Albers*, 475 U.S. at 316, held, in the context of a prison riot, that a "shoot low" (*i.e.*, below vital organs) policy could be applied without individual suspicion to any prisoner climbing stairs leading to where hostages were being held. Most recently, *Florence* v. *Board of Chosen Freeholders*, 132 S. Ct. at 1523, upheld visual strip searches of all arrestees without individualized suspicion.[35]

The reasoning of these cases applies with equal, if not more, force here where defendants had an obvious and legitimate interest in identifying anyone connected with the 9/11 attacks and in safeguarding the nation from further terrorist attacks. Because the attacks were carried out by Arab Muslim aliens who proclaimed themselves members of al Qaeda, it is "no surprise" that authorities focused their investigative and preventative attention on persons encountered in the course of the FBI's 9/11 in-

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[35] The majority attempts to distinguish these cases by saying that, in each, the Supreme Court did not state that individualized suspicion was not required but, rather, determined that the challenged restrictions reasonably related to the legitimate object of prison security. See Majority Op., *ante* at 58 n.31. The reasoning is perplexing. Implicit in the rejection of challenges to generally applicable restrictive conditions of confinement is the conclusion that no individualized suspicion was necessary for the condition reasonably to relate to the legitimate object of prison security. In any event, the majority points to no case holding a generally applicable restrictive condition to fail the reasonably related inquiry for lack of individualized suspicion, and certainly not one doing so in the context of a condition whose professed object is national security.

vestigation, who were not lawfully in this country, and who fell within the same ethnic and religious group as the hijackers or as those targeted for recruitment by al Qaeda. *Ashcroft* v. *Iqbal*, 556 U.S. at 682 (recognizing that circumstances of 9/11 attacks necessarily produced "disparate, incidental impact on Arab Muslims"); see also *United States* v. *Farhane*, 634 F.3d 127, 132 n.4 (2d Cir. 2011) (discussing "fatwa" proclaiming it religious duty of Muslims worldwide to kill Americans and their allies wherever found). Moreover, given (1) the inherent difficulty in identifying in advance of an FBI-CIA investigation who, among such a group of illegal aliens, might have terrorist connections; (2) the serious risk of murderous harm posed by persons with such connections (even while incarcerated[36]); and (3) events following 9/11 fueling fears of further imminent attacks,[37] I cannot conclude that established precedent would have alerted the Attorney General, the FBI Director, and the INS Commissioner that, in the absence of individualized suspicion of terrorist connections, it was arbitrary or purposeless to national security to hold such illegal aliens in restrictive, rather than general, confinement pending clearance.

In disputing that conclusion, the majority mischaracterizes this dissent to assert that "because the MDC Plaintiffs were, or appeared to be, members of the group—Arab or Muslim males—that were targeted for recruitment by al Qaeda, they may be held in the ADMAX SHU without any reasonable suspicion of terrorist activity." Majority Op., *ante* at 56. I suggest no such

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[36] See *infra* at 67-68 (discussing actions of Omar Abdel Rahman and Mamdouh Mahmud Salim while incarcerated).

[37] See *supra* at 28 & n.19 (detailing anthrax scare, airliner crash, shoe bomb attempt, and journalist beheading, all within five months of 9/11 attacks).

thing. In fact, no plaintiff was "held" on anything less than probable cause, specifically, probable cause to think the alien was in violation of federal immigration laws. Moreover, the majority itself identifies no plausible constitutional claim against the DOJ Defendants for *holding* 9/11 detainees until they were cleared of terrorism connections—even though detainees were overwhelmingly Arab and Muslim, and detention continued after the lists-merger decision even without individualized suspicion of terrorism for the New York list detainees. See Majority Op., *ante* at 39-40. Nor does it identify any precedent clearly establishing that substantive due process does not permit detention to be restrictive in such circumstances unless there is individualized suspicion of terrorist connections. It is in the absence of such precedent that I assert the DOJ Defendants are entitled to qualified immunity.

Nor do I suggest that government officials can "hold[ ] someone in the most restrictive conditions of confinement available simply because he happens to be—or, worse yet, appeared to be—Arab or Muslim." Majority Op., *ante* at 57. Rather, as I explain in discussing plaintiffs' equal protection claim, the pleadings do not admit a plausible inference that the MDC Plaintiffs were restrictively confined *because of* their ethnicity or religion. See *infra* Part II.B.

The majority further misconstrues the dissent "to imply that once 'national security' concerns become a reason for holding someone," there is no need to consider whether restrictive conditions reasonably relate to that objective. See Majority Op., *ante* at 55. Not so. *Bell* v. *Wolfish* makes plain that neither confinement, nor any condition of confinement, can be imposed on pre-trial detainees *for the purpose of punishment*. See 441 U.S. at

535. Thus, I have never suggested that a legitimate national security purpose for holding someone supports the further imposition of restrictive conditions of confinement without any need to consider whether such conditions also reasonably relate to the same objective, or whether they are so arbitrary and purposeless as to admit an inference that their real purpose was punishment. What I assert is that an arbitrary and purposeless conclusion as to the restrictive conditions here at issue is not so beyond debate that the DOJ Defendants can be denied qualified immunity.

To explain, isolating the 9/11 detainees confined at the MDC from one another and from the outside world while clearance investigations were conducted ensured that—in the event detainees were found to have terrorist connections—they would not have been able to communicate in ways that either furthered terrorist plans or thwarted government investigations. Further, strict restrictions on prison movement and cell conditions minimized the possibility that, while clearance was pursued, an as-yet-unidentified terrorist associate would threaten either national or prison security. We need only look to our own precedent to understand why the executive would reasonably have had such concerns. In the two years before the 9/11 attacks, convicted terrorist Omar Abdel Rahman ("the Blind Sheikh") had managed to use his lawyer to communicate from prison to followers in Egypt that he now sanctioned renewed terrorist attacks. See *United States* v. *Stewart*, 590 F.3d 93, 163-65 (2d Cir. 2009) (Walker, J., concurring in part and dissenting in part). Also in the year before 9/11, pre-trial detainee Mamdouh Mahmud Salim, charged with participating in the bombings of United States embassies in Africa, viciously attacked a guard at New York's Metropolitan Correctional

Center with a sharpened plastic comb, causing the guard both to lose an eye and to suffer permanent brain damage. See *United States* v. *Salim*, 690 F.3d 115, 119-20 (2d Cir. 2012). Both men had been held in some degree of restrictive confinement. Events after 9/11, suggesting ongoing terrorist plots, see *supra* at 28 & n.19, would only have reinforced the executive's view that national security required that the MDC Plaintiffs be restrictively confined until authorities could determine whether they had terrorist connections. The majority cites no established precedent to the contrary. Nor can it ground an arbitrary and purposeless conclusion in the fact that not all New York list detainees were held in restrictive confinement pending clearance. See Majority Op., *ante* at 59. As the Supreme Court stated in *Bell* v. *Wolfish*, "the Due Process Clause does not mandate a 'lowest common denominator' security standard, whereby a practice permitted at one penal institution must be permitted at all institutions." 441 U.S. at 554. Its singular concern is that defendants' real purpose not be punitive.

With the benefit—or handicap—of hindsight, persons might now debate how well the challenged restrictive confinement policy at the MDC served national security interests.[38] But it is no more a judicial function to decide how best to ensure national security than it is to decide how best to operate a detention facility. See *id.* at 539. Rather, on qualified immunity review, our task is to de-

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[38] See 9/11 Report 339 (cautioning, with respect to judging actions leading and responding to 9/11 attacks, that hindsight can both make things seem "crystal clear" that at relevant time were "obscure and pregnant with conflicting meanings," and make it "harder to reimagine" the "preoccupations and uncertainty" of a past time as memories "become colored" by knowledge of what happened and was written later).

termine whether the MDC Plaintiffs plausibly allege a substantive due process violation that, in late 2001, was so clearly established by precedent as to put the illegality of the DOJ Defendants' actions beyond debate. See *Ashcroft* v. *al-Kidd*, 131 S. Ct. at 2083. For the reasons stated herein, I conclude that is not this case and that the DOJ Defendants are, therefore, entitled to dismissal of plaintiffs' punitive confinement claim on the ground of qualified immunity.

2. *MDC Defendants*

By contrast to the DOJ Defendants, MDC Defendants Hasty and Sherman were personally involved in the MDC Plaintiffs' restrictive confinement in the ADMAX SHU both before and after the November 2001 merger decision.[39] As warden and deputy warden of the MDC, however, these defendants have a particular claim to judicial deference in determining the confinement conditions reasonably related to legitimate security interests. See *Florence* v. *Bd. of Chosen Freeholders*, 132 S. Ct. at 1517; *Bell* v. *Wolfish*, 441 U.S. at 548. The majority concludes that no such deference is warranted here because the MDC Defendants (1) imposed the conditions without adequate supporting information or an evaluation of their propriety, and (2) maintained the restrictive conditions even after learning that they were not supported by individualized suspicion of the detained aliens' terrorist connections. See Majority Op., *ante* at 63-65. Moreover, the majority observes that this court denied qualified immunity on a materially identical substantive due process claim in *Iqbal* v. *Hasty*, 490 F.3d at 143, 168-69, and iden-

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[39] The decision to impose strict restrictive confinement was apparently made at the headquarters level of the BOP, see OIG Report 19, with the MDC Defendants establishing the conditions effecting such confinement, see Compl. ¶¶ 24, 26, 68, 75.

tifies no reason to rule differently here. See Majority Op., *ante* at 73. I respectfully disagree.

First, plaintiffs' pleadings do not admit a plausible inference that Hasty and Sherman imposed restrictive conditions of confinement without any supporting information or assessment of propriety. As to the latter, the OIG Report recounts that, immediately after the 9/11 attacks, BOP Headquarters ordered that "all detainees who were 'convicted of, charged with, associated with, or in any way linked to terrorist activities' . . . be placed in the highest level of restrictive detention." OIG Report 112. A plausible inference of punitive intent cannot reasonably be drawn from the MDC Defendants' carrying out this order without making an independent assessment of its categorical need. The obvious and more likely motivation for their doing so is national and prison security. Defendants reasonably deferred to their superiors' assessment that, in the aftermath of a devastating terrorist attack, lawfully arrested illegal aliens, whom the FBI and CIA were investigating for possible terrorist connections, should be kept "in the most secure conditions available until the suspects could be cleared of terrorist activity." *Ashcroft* v. *Iqbal*, 556 U.S. at 683. The Supreme Court has already held that such motivation does not admit a plausible inference of discriminatory intent. See *id.* No more will it admit a plausible inference of punitive intent.

Further, because it is undisputed that the FBI had designated each MDC Plaintiff as a person "of high interest," or "of interest" in their ongoing terrorism investigation, and that BOP employees relied on this designation in imposing restrictive confinement, see, *e.g.*, Compl. ¶¶ 1-2, 4; see also OIG Report 111-12, 126, 158, it cannot be said that the MDC Defendants acted without *any* in-

formation so as to admit an inference that their conduct was arbitrary or purposeless. See generally *Martinez* v. *Simonetti*, 202 F.3d 625, 635 (2d Cir. 2000) (holding that police may reasonably rely on information provided by other officers even when confronted with conflicting accounts). Thus, these allegations do not plausibly imply discriminatory intent.

Second, insofar as plaintiffs fault the MDC Defendants for maintaining them in restrictive confinement even after learning that the FBI's designations were not based on individualized suspicion, I have already explained with reference to the DOJ Defendants why established precedent does not support that conclusion, much less alert every reasonable federal official that restrictive confinement in the absence of individualized suspicion of a security threat violates substantive due process. See *supra* at 62-63.

Iqbal v. *Hasty*, 490 F.3d 140, does not dictate otherwise. As discussed *supra* at 61-62, the court there applied a "notice pleading standard" to "general allegations of knowledge" to identify alleged "purposeful infliction of restraints that were punitive in nature." *Id.* at 169. In thus identifying *express* punitive intent, *Hasty* never discussed whether the pleadings otherwise plausibly *implied* intent. Although the MDC Defendants were not parties in *Ashcroft* v. *Iqbal*, the Supreme Court's rejection of the pleading standard employed in *Hasty*, see 556 U.S. at 684, does not admit preclusive effect to *Hasty*'s assessment of the sufficiency of plaintiffs' specific intent claims, particularly insofar as they imply intent.[40]

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[40] Indeed, when reviewing *Turkmen I* in light of *Ashcroft* v. *Iqbal*, we vacated the district court's decision and remanded "for further proceedings consistent with the standard articulated in *Twombly* and *Iqbal*." *Turkmen II*, 589 F.3d at 546-47. On remand, the district

Accordingly, I would dismiss plaintiffs' policy-challenging punitive confinement claim against the MDC Defendants, as well as the DOJ Defendants, on grounds of qualified immunity.[41]

B. Discriminatory Confinement

To state a Fifth Amendment claim for discriminatory confinement, a plaintiff must plead sufficient factual matter to show that defendants adopted the challenged restrictive confinement policy not for a neutral reason "but for the purpose of discriminating on account of race, religion, or national origin." *Ashcroft* v. *Iqbal*, 556 U.S. at 676-77 (explaining that standard is not satisfied by pleadings of intent as "volition" or "awareness of consequences"; instead, pleadings must plausibly allege that defendant undertook conduct "because of," not merely "in spite of[,]" its discriminatory effect). The Supreme Court articulated this standard in reversing this court's determination that these plaintiffs' original complaint stated a plausible claim for discriminatory confinement based on race, religion, or national origin. See *id.* at 687. While acknowledging that plaintiffs had pleaded facts "consistent with" purposeful discrimination, the Court concluded that such a claim was not plausible in light of the "obvious," and "more likely" non-discriminatory reason for the challenged confinement policy, specifically, national security concerns about "potential connections" between illegal aliens identified in the course of the FBI's investigation of the 9/11 attacks and Islamic terrorism.

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court did not cite *Hasty* in identifying a plausible punitive confinement claim against the MDC Defendants. See *Turkmen III*, 915 F. Supp. 2d at 341. These developments do not comport with a conclusion that *Hasty* is dispositive on this appeal.

[41] This dissent does not pertain to plaintiffs' non-policy claims of "unofficial abuse" against the MDC Defendants.

Id. at 682-83 (holding that, where all pleadings "plausibly suggest[] is that the Nation's top law enforcement officers, in the aftermath of a devastating terrorist attack, sought to keep suspected terrorists in the most secure conditions available until the suspects could be cleared of terrorist activity," plaintiffs "would need to allege more by way of factual content to nudge [their] claim[s] of purposeful discrimination across the line from conceivable to plausible" (internal quotation marks omitted)).

One might have thought that put plaintiffs' policy-challenging claims of discriminatory confinement to rest. The majority, however, affords the MDC Plaintiffs another opportunity to pursue these claims, concluding that the newest amended complaint now pleads sufficient facts to show that it is "not more likely" that the MDC Plaintiffs were held in restrictive confinement because of suspected ties to terrorism. Majority Op., *ante* at 83.

The pleadings the majority cites to support this conclusion as to both the DOJ and MDC Defendants can be summarized as follows: (1) the New York FBI office expressly relied on race, religion, ethnicity, and national origin in targeting persons identified in their 9/11 investigation for detention; (2) the DOJ Defendants were aware of and condoned such discriminatory intent by merging the New York FBI detainee list with the INS national detainee list, knowing that the former list was not supported by individualized suspicion of a terrorist threat; (3) the MDC Defendants also knew there was no individualized suspicion tying the aforementioned detainees to terrorism when they confined them in the ADMAX SHU; and (4) the MDC Defendants falsely reported that MDC staff had classified the ADMAX SHU detainees as "high security" based on an individualized assessment

when no such assessment was ever conducted. See *id.* at 55-62. I am not persuaded.

First, the amended complaint's pleadings of purposeful FBI discrimination are not materially different from those considered in *Ashcroft* v. *Iqbal*. See 556 U.S. at 669 (acknowledging that plaintiffs pleaded purposeful designation of detainees based on race, religion, or national origin); see also *id.* at 698 (Souter, J., dissenting) (detailing specific allegations that FBI officials implemented policy that discriminated against Arab Muslim men based solely on race, religion, or national origin). Thus, we are bound by the Supreme Court's holding that such allegations are inadequate to plead plausible discriminatory intent in light of the obvious and more likely national security explanation for the challenged confinement. See *id.* at 681-82.

Not insignificantly, in reaching this conclusion, the Supreme Court acknowledged that it was the perpetrators of the 9/11 attacks who injected religion and ethnicity into the government's investigative and preventative efforts. The Court stated that the attacks "were perpetrated by 19 Arab Muslim hijackers who counted themselves members in good standing of al Qaeda, an Islamic fundamentalist group. Al Qaeda was headed by another Arab Muslim—Osama bin Laden—and composed in large part of his Arab Muslim disciples." *Id.* at 682. Where a terrorist group thus effectively defines itself by reference to religion and ethnicity, see *supra* at 64, the Constitution does not require investigating authorities to ignore that reality nor to dilute limited resources casting a wider net for no good reason. It is "no surprise" then that a law enforcement policy—including a restrictive confinement policy—legitimately aimed at identifying persons with connections to the 9/11 attacks and prevent-

ing further attacks "would produce a disparate, incidental impact on Arab Muslims, even though the purpose of the policy was to target neither Arabs nor Muslims." *Ashcroft* v. *Iqbal*, 556 U.S. at 682; see also *Brown* v. *City of Oneonta*, 221 F.3d at 337 (observing that racial description of perpetrator, "which originated not with the state but with the victim, was a legitimate classification within which potential suspects might be found," even though it might well have disparate impact on minority groups).[42]

Thus, as in *Ashcroft* v. *Iqbal*, plaintiffs cannot plausibly imply proscribed discriminatory intent from pleadings merely "consistent with" the New York FBI's alleged purposeful targeting and detention of aliens based on ethnicity and religion. 556 U.S. at 681-82. Here, those characteristics originated with the terrorists not the state, the FBI actions were limited to aliens not lawfully in this country and encountered in the course of the 9/11 investigation, and the obvious and more likely reason for the challenged confinement was ensuring national security in the face of an Islamic terrorist threat.[43]

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[42] In recently forbidding investigative stereotyping, the Department of Justice nevertheless stated that, "in conducting activities directed at a specific criminal organization or terrorist group whose membership has been identified as overwhelmingly possessing a listed characteristic, law enforcement should not be expected to disregard such facts in taking investigative or preventive steps aimed at the organizations' activities." U.S. Dep't of Justice, *Guidance for Federal Law Enforcement Agencies Regarding the Use of Race, Ethnicity, Gender, National Origin, Religion, Sexual Orientation, or Gender Identity* 4 (Dec. 2014), available at http://1.usa.gov/1ytxRoa.

[43] In discussing the actions of the New York FBI office—and particularly its maintenance of its own list of 9/11 detainees—the OIG and the majority reference that office's tradition of independence from headquarters. See Majority Op., *ante* at 24 n.12 (citing OIG Report

Second, the DOJ Defendants' purported involvement with the lists-merger decision also cannot imply these defendants' discriminatory intent. As I have already explained with respect to punitive intent, plaintiffs fail plausibly to plead these defendants' involvement with that decision. See *supra* at 44-51.

In any event, the merger decision—by whomever made—applied equally to all New York list detainees, the larger number of whom were not subjected to restrictive confinement, but housed in general prison population at the Passaic County Jail, even though they shared the same racial, religious, and national identities as the MDC Plaintiffs. See *supra* at 51-52. Such circumstances do not permit discriminatory intent plausibly to be inferred from the merger decision. See generally *O'Connor* v. *Consol. Coin Caterers Corp.*, 517 U.S. 308, 313 (1996) (holding that inference of age discrimination cannot be drawn from "replacement of one worker with another worker insignificantly younger"); *James* v. *N.Y. Racing Ass'n*, 233 F.3d 149, 154 (2d Cir. 2000) (stating that *prima facie* case for discrimination required proof of em-

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54). Such independence does not plausibly imply rogue conduct. To the contrary, in the years before 9/11, the New York FBI office led the nation's pursuit of Islamic terrorism, as is evident in a number of exemplary investigations. See, *e.g.*, 9/11 Report 72 (commending "superb investigative and prosecutorial effort" of New York FBI and U.S. Attorney's Office in identifying and convicting perpetrators of first World Trade Center attack, as well as the "Blind Sheikh" and Ramzi Yousef); see also *In re Terrorist Bombings of U.S. Embassies in E. Africa*, 552 F.3d 93 (affirming New York convictions for terrorist bombings of American embassies in Africa based on guilty verdicts returned only weeks before 9/11). In short, at the time of the 9/11 investigation, there was no FBI field office with greater knowledge of, or experience investigating, Islamic terrorism than that in New York. This, and not invidious discriminatory intent, is the obvious and more likely explanation for its independence.

ployer "preference for a person not of the protected class"). Indeed, the conclusion that a plaintiff cannot urge an inference of discriminatory purpose from his receipt of treatment less favorable than most members of his own protected class is so obvious that we generally pronounce it summarily. See, *e.g.*, *Fleming* v. *MaxMara USA, Inc.*, 371 F. App'x 115, 117 (2d Cir. 2010) (summary order). District court opinions in this circuit to the same effect are countless. See, *e.g.*, *Baez* v. *New York*, 56 F. Supp. 3d 456, 467-68 (S.D.N.Y. 2014) (collecting cases); *White* v. *Pacifica Found.*, 973 F. Supp. 2d 363, 381 (S.D.N.Y. 2013) (collecting cases). Thus, no clearly established law would have alerted every reasonable official that the lists-merger decision violated equal protection.[44]

In concluding otherwise, the majority dismisses the Passaic assignments as a "red herring." Majority Op., *ante* at 85. The label will not stick. The reality that most Arab Muslim detainees on the New York list were *not* held in restrictive confinement precludes a plausible in-

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[44] The majority recognizes that the precedent cited herein undermines plaintiffs' equal protection claim, but it maintains that these holdings properly apply on summary judgment review, not dismissal. See Majority Op., *ante* at 85 n.39. *Bell Atlantic Corp.* v. *Twombly*, 550 U.S. 544 (2007), does not admit that conclusion. Therein, the Supreme Court observed that it had earlier ruled "at the summary judgment stage" that an inference of anticompetitive collusion could not be drawn from parallel conduct. *Id.* at 554 (citing *Matsushita Elec. Indus. Co.* v. *Zenith Radio Corp.*, 475 U.S. 574 (1976)). It then applied that same rule at the motion to dismiss stage, holding that where plaintiffs' pleadings, taken as true, show only parallel conduct, a conspiracy is not plausibly alleged. See *id.* at 556. The same principle applies here. Just as evidence of differential treatment within a suspect class is insufficient on summary judgment to demonstrate proscribed discriminatory intent, allegations of such differential treatment are insufficient to plead discriminatory intent so as to defeat a motion for dismissal.

ference that arresting FBI agents were intent on discriminating against Arab Muslims in assigning a minority of New York detainees to the MDC. Thus, even if the lists-merger decision can be understood to manifest the DOJ Defendants' "deference to others' designation of detainees for particular facilities," *id.* at 84, that is not a factual basis for plausibly inferring their discriminatory intent against MDC detainees. To overcome this hurdle, the majority parenthetically suggests that "for all [the DOJ Defendants] knew, all" New York list detainees were held in restrictive confinement. *Id.* This is, again, pure speculation. Moreover, because the facts are to the contrary, a plaintiff (or a panel majority) looking to locate invidious intent in defendants' *possible misunderstanding* of the confinement circumstances surely needs to identify some factual basis for its hypothesis. *See Ashcroft* v. *Iqbal*, 556 U.S. at 678. That is missing here.

In sum, plaintiffs fail plausibly to plead either that DOJ Defendants were responsible for the lists-merger decision or that the decision was animated by discriminatory intent.

Third, allegations that the DOJ and MDC Defendants maintained the challenged restrictive confinement after learning that the FBI designations were not based on individualized suspicion of terrorist threats are also inadequate to conclude that defendants were "not more likely" concerned with ensuring national and prison security. Majority Op., *ante* at 83. Indeed, the conclusion is foreclosed by *Ashcroft* v. *Iqbal*, 556 U.S. at 681-82, because the discrimination allegations there deemed implausible in light of the more likely national security explanation for defendants' actions included assertions that the MDC Plaintiffs' restrictive confinement was not supported by "any individual determination" that such restrictions

were "appropriate or should continue." First Am. Compl. ¶97, App. to Pet. for Cert. 173a, *Ashcroft* v. *Iqbal*, No. 07-1015 (U.S. Feb. 6, 2008), available at http://1.usa.gov/1CfHJQF. Thus, the majority cannot suggest that when the Supreme Court there rejected an equal protection challenge to efforts by "the Nation's top law enforcement officers . . . to keep suspected terrorists in the most secure conditions available until the suspects could be cleared of terrorist activity," *Ashcroft* v. *Iqbal*, 556 U.S. at 682-83, it did not understand that plaintiffs were complaining of the lack of prior individualized suspicion. See Majority Op., *ante* at 82-83.[45]

In any event, and as already explained, courts have upheld the imposition of restrictive conditions of confinement on lawfully arrested persons without requiring individualized suspicion of a security threat, recognizing both the difficulty in identifying which detainees pose the particular risk needing to be addressed, and the serious harm that can ensue from a failure to do so. See *supra* at 62-63. Thus, no clearly established law would have alerted reasonable officials that restrictive confinement without individualized suspicion was unconstitutionally punitive or discriminatory in the circumstances presented here.

Fourth, allegations that the MDC Defendants (1) failed to follow BOP procedures requiring "individualized determination of dangerousness or risk" for restrictive confinement, and (2) approved documents falsely representing that such determinations had been made, also do not render it "not more likely" that the challenged conduct was motivated by national security. See Majori-

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[45] The lists-merger pleadings support no different conclusion for reasons just discussed. See Majority Op., *ante* at 84-85.

ty Op., *ante* at 86. This court has already granted qualified immunity to some of these same MDC Defendants on a procedural due process challenge to their failure to follow BOP procedures in connection with the same challenged confinement. See *Iqbal* v. *Hasty*, 490 F.3d at 167-68. In doing so, moreover, *Hasty* acknowledged that the "separation" of the MDC Plaintiffs "from the general prison population could be reasonably understood . . . to relate to matters of national security, rather than an ordinary criminal investigation." *Id.* at 167. *Hasty* further noted that, in 2001-2002, neither the Supreme Court nor this court had considered whether BOP administrative segregation procedures had to be afforded "to persons detained under special conditions of confinement until cleared of connection with activities threatening national security." *Id.*

The fact that plaintiffs here use procedural failures to imply discriminatory intent rather than to assert a denial of procedural due process warrants no different qualified immunity conclusion. As the OIG Report indicates, by October 1, 2001, BOP Headquarters had effectively ceded "individualized" risk assessment responsibility for 9/11 detainees to the FBI. A memorandum of that date from Michael Cooksey, the BOP Assistant Director for Correctional Programs, "directed all BOP staff, including staff at the MDC, to continue holding September 11 detainees in the most restrictive conditions of confinement possible until the detainees could be 'reviewed on a case-by-case basis by the FBI and cleared of any involvement in or knowledge of on-going terrorist activities.'" OIG Report 116 (quoting Cooksey's October 1, 2001 memorandum). In these circumstances, even if the MDC Defendants might be faulted for approving documents suggesting individualized risk assessments of MDC Plain-

tiffs that were not made by the BOP, their actions cannot plausibly imply discriminatory intent because they are obviously and more likely explained by reliance on the FBI's designations of each MDC Plaintiff as a person "of high interest," or "of interest," to the ongoing terrorism investigation.

In sum, as to both the DOJ and MDC Defendants, the pleadings highlighted by the majority are insufficient to render "not more likely" what the Supreme Court in *Ashcroft* v. *Iqbal* held "obvious" and "more likely": MDC Plaintiffs were restrictively confined pending FBI-CIA clearance for the legitimate purpose of ensuring national security. 556 U.S. at 681-82. Moreover, to the extent the majority implies discriminatory intent from the MDC Plaintiffs' restrictive confinement without individualized suspicion of terrorist connections, no clearly established law would have alerted every reasonable officer that it violated equal protection so to confine these lawfully arrested illegal aliens pending clearance. Accordingly, I conclude that both the DOJ and the MDC Defendants are entitled to dismissal of the MDC Plaintiffs' equal protection claims on the ground of qualified immunity.[46]

C. Fourth Amendment Claim

As the majority acknowledges, plaintiffs do not assert that the Fourth Amendment absolutely prohibited them from being strip-searched while incarcerated at the

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[46] Because I would dismiss plaintiffs' equal protection claims, I would also dismiss their § 1985 claims. See *Griffin* v. *Breckenridge*, 403 U.S. 88, 102 (1971) ("The language [in § 1985(3)] requiring intent to deprive of equal protection, or equal privileges and immunities, means that there must be some racial, or perhaps otherwise class-based, invidiously discriminatory animus behind the conspirators' action."); accord *Reynolds* v. *Barrett*, 685 F.3d 193, 201-02 (2d Cir. 2012).

MDC. See Majority Op., *ante* at 95. Rather, plaintiffs contend that the frequency with which they were strip searched—every time they were removed from or returned to their cells, or randomly even when not so moved, "even when they had no conceivable opportunity to obtain contraband"—was constitutionally unreasonable. Compl. ¶112. They further allege that the manner in which they were strip searched—with female officers present or in view of other prisoners and staff, with prohibited videotaping, or with humiliating comments—was unconstitutional. See *id.* ¶¶112-15.

Insofar as plaintiffs seek damages from MDC Defendants Hasty and Sherman for the challenged strip search policy, *Ashcroft* v. *Iqbal* does not admit a theory of supervisory liability on a *Bivens* claim. See 556 U.S. at 676-77. Rather, plaintiffs must plausibly plead that each *Bivens* defendant, "through the official's own individual actions, has violated the Constitution." *Id.* at 676. Plaintiffs do not allege that Hasty and Sherman themselves ever participated in any of the challenged strip searches or that they personally developed the policy. The latter conduct is attributed to MDC First Lieutenant Joseph Cuciti. See Compl. ¶111.

The majority nevertheless concludes that plaintiffs carry their *Iqbal* pleading burden by alleging that (1) "Hasty ordered [MDC Captain] Lopresti and Cuciti to design extremely restrictive conditions of confinement," which were "then approved and implemented by Hasty and Sherman," *id.* ¶75; and (2) many of the strip searches "were documented in a 'visual search log' created by MDC staff for review by MDC management, including Hasty," *id.* ¶114. The majority holds that these pleadings are sufficient to allege Hasty's and Sherman's personal involvement "in creating and executing" the chal-

lenged strip-search policy, or at least their awareness of the searches "based on the search log." Majority Op., *ante* at 97-98. It then further concludes that neither Hasty nor Sherman is entitled to qualified immunity because, at the time of the MDC Plaintiffs' confinement, it was clearly established that strip searches had to be "'rationally related to legitimate government purposes.'" *Id.* at 100 (quoting *Iqbal* v. *Hasty*, 490 F.3d at 172). I cannot join in this reasoning.

First, insofar as plaintiffs challenge the frequency of the strip searches, it is their burden to plead facts sufficient to demonstrate that the challenged policy lacked a rational relationship to a legitimate government objective, specifically, prison security. See *Turner* v. *Safley*, 482 U.S. at 89 (establishing standard for challenging prison regulation); *Covino* v. *Patrissi*, 967 F.2d at 78-80 (applying standard to body-cavity search challenge). That burden is, moreover, a heavy one because it requires a showing that the "logical connection between the regulation and the asserted goal is so remote as to render the policy arbitrary or irrational." *Turner* v. *Safley*, 482 U.S. at 89-90. I do not think plaintiffs' pleadings plausibly allege that the frequency with which they were strip searched was so unrelated to prison security as to be arbitrary or irrational.

Plaintiffs assert that they were strip searched "even when they had no conceivable opportunity to obtain contraband." Compl. ¶112. The conclusion borrows from *Hodges* v. *Stanley*, a case in which this court reinstated a complaint challenging a second strip search under circumstances where "it seems clear that there was no possibility that Hodges could have obtained and concealed contraband." 712 F.2d 34, 35 (2d Cir. 1983). *Hodges*, however, was decided before *Turner* and *Covino*. Thus,

courts cannot assume that its "no possibility" to obtain contraband conclusion invariably equates to the required showing of no rational relationship to a legitimate government purpose. Notably, *Hodges* reached the "no possibility" conclusion in circumstances where the prisoner had been searched "*immediately* prior to the search forming the basis of his complaint." *Id.* at 35 (emphasis added). Plaintiffs here allege no such immediately successive—and, therefore, purposeless—strip searches. Rather, they complain of random strip searches in their cells or of required strip searches in circumstances involving intervening events—*e.g.*, before and after non-contact visits—that *plaintiffs* conclusorily maintain afforded them no opportunity to receive contraband. See Compl. ¶112. In the aftermath, however, of an all-too-successful attack on a BOP guard by a restrictively confined terrorist suspect, see *United States* v. *Salim*, 690 F.3d at 119-20, it was hardly irrational for prison authorities to conclude that persons under investigation for terrorist connections should be strip searched both randomly in their cells and whenever they were moved from one location to another to ensure prison security. *Hodges* cannot be read to make clear to every reasonable officer that such searches were unconstitutional. Indeed, this is precisely the sort of "difficult judgment[ ] concerning institutional operations" that the Supreme Court has concluded must be made by "prison administrators . . . , and not the courts." *Turner* v. *Safley*, 482 U.S. at 89 (internal quotation marks omitted).[47]

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[47] The majority's reliance on *Iqbal* v. *Hasty*, 490 F.3d at 172, in holding otherwise, see Majority Op., *ante* at 98, is misplaced for the reasons already discussed. See *supra* at 61-62.

So too is its citation to *N.G.* v. *Connecticut*, 382 F.3d 225 (2d Cir. 2004). See Majority Op., *ante* at 98 n.44. There, this court held that

Second, with respect to the manner in which the searches were conducted, plaintiffs' claims against Hasty and Sherman depend on these defendants' review of a visual search log allegedly created by MDC staff for management. The "possibility" that defendants reviewed such logs is not enough, however, to state a plausible claim against them for the manner of the searches. *Ashcroft* v. *Iqbal*, 556 U.S. at 678 (stating that "plausibility standard . . . asks for more than a sheer possibility that a defendant has acted unlawfully"). Indeed, even if their review of the logs were plausible, it would, at best, support an inference of Hasty's and Sherman's knowledge of the manner in which the searches were being conducted. Further facts indicating more than negligence in these defendants' failure to take corrective action would be necessary plausibly to plead that through their "own individual actions," each had "violated the Constitution." *Id.* at 676; see also, *e.g.*, *O'Neill* v. *Krzeminski*, 839 F.2d

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repetitive strip searches after supervisory transport of persons confined in *juvenile* facilities were not reasonable under the Fourth Amendment in the absence of reason to suspect the juvenile's possession of contraband. See *N.G.* v. *Connecticut*, 382 F.3d at 233-34. It is hardly apparent that the same conclusion applies where the persons being searched are adults and where they are being confined subject to clearance of terrorist activities. The higher risks to prison and public safety of missed contraband in that circumstance, as well as terrorists' proved ability to evade even restrictive confinement does not admit a conclusion that *N.G.* clearly established unreasonableness in the context here at issue. See generally *id.* at 234 (acknowledging that continuous custody cannot "guarantee" protection for subsequent access to contraband).

Even if such a conclusion were possible, however, *N.G.* was not decided until *2004*. Thus, the majority can hardly rely on that decision as the clearly established law that, in late *2001*, put beyond debate that the strip-search policy here at issue violated the Fourth Amendment.

9, 11 n.1 (2d Cir. 1988) ("Negligence is not a basis of liability for constitutional torts.").

I would thus grant Hasty and Sherman dismissal of the MDC Plaintiffs' Fourth Amendment claim on the ground of qualified immunity.

* * *

In sum, I respectfully dissent from the judgment entered on appeal in this case insofar as it allows the MDC Plaintiffs to pursue money damages on policy-challenging Fifth Amendment claims for punitive and discriminatory confinement against defendants Ashcroft, Mueller, Ziglar, Hasty, and Sherman, and an attendant policy-challenging Fourth Amendment claim for unreasonable strip searches against defendants Hasty and Sherman. I conclude that no established *Bivens* action is available for plaintiffs to pursue these claims and that significant factors counsel hesitation in extending *Bivens* to an action challenging executive policy pertaining to immigration and national security made in a time of crisis. In any event, I would grant defendants' motions for dismissal on grounds of qualified immunity because plaintiffs fail either to plead plausible constitutional violations or to demonstrate that clearly established law would have alerted every reasonable official that the challenged actions were unlawful.

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

FOR PUBLICATION

No. 02-CV-2307

IBRAHIM TURKMEN, AKHIL SACHDEVA, AHMER IQBAL ABBASI, ANSER MEHMOOD, BENAMAR BENATTA, AHMED KHALIFA, SAEED HAMMOUDA, PURNA RAJ BAJRACHARYA, ON BEHALF OF THEMSELVES AND ALL OTHERS SIMILARLY SITUATED,

Plaintiffs,

v.

JOHN ASHCROFT, FORMER ATTORNEY GENERAL OF THE UNITED STATES, ROBERT MUELLER, FORMER DIRECTOR, FEDERAL BUREAU OF INVESTIGATION, JAMES W. ZIGLAR, FORMER COMMISSIONER, IMMIGRATION AND NATURALIZATION SERVICE, DENNIS HASTY, FORMER WARDEN OF THE METROPOLITAN DETENTION CENTER, MICHAEL ZENK, FORMER WARDEN OF THE METROPOLITAN DETENTION CENTER, JAMES SHERMAN, FORMER METROPOLITAN DETENTION CENTER ASSOCIATE WARDEN FOR CUSTODY, SALVATORE LOPRESTI, FORMER METROPOLITAN DETENTION CENTER CAPTAIN, JOSEPH CUCITI, FORMER METROPOLITAN DETENTION CENTER LIEUTENANT,

Defendants.

MEMORANDUM
AND ORDER

JOHN GLEESON, United States District Judge:

Plaintiffs Ibrahim Turkmen, Akhil Sachdeva, Ahmer Iqbal Abbasi, Anser Mehmood, Benamar Benatta, Ahmed Khalifa, Saeed Hammouda, and Purna Raj Bajracharya bring this putative class action against John Ashcroft, Robert Mueller, James Ziglar, Dennis Hasty, Michael Zenk, James Sherman, Salvatore Lopresti, and Joseph Cuciti. Plaintiffs were arrested and detained by federal authorities in connection with the investigation of the terrorist attacks of September 11, 2011. They bring six *Bivens* claims and a seventh claim under 42 U.S.C. § 1985, all arising out of their allegations of discriminatory and punitive detention. The defendants have now moved to dismiss. For the reasons set forth below, the defendants' motions are granted in part and denied in part.

Specifically, the claims based on the alleged harsh conditions of confinement and unlawful strip searches (Claims One, Two and Six) shall proceed against Hasty, Zenk, Sherman, Lopresti, and Cuciti. To the extent they are alleged against Ashcroft, Mueller and Ziglar,[1] the allegations are insufficient and the claims are therefore dismissed as against them. As for the claimed deprivation of the plaintiffs' free exercise rights (Claim Three), I hold that the *Bivens* damages remedy is extended to this context and that the claim shall proceed against Hasty, Zenk, Sherman, Lopresti, and Cuciti. It is insufficiently pled against Ashcroft, Mueller and Ziglar and is therefore dismissed as against them. The claims based on the

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[1] These three defendants are not named as defendants in Claim Six, which focuses specifically on strip searches.

alleged communications blackout and interference with counsel (Claims Four and Five) are dismissed as to all defendants on the ground of qualified immunity. Finally, the conspiracy claim (Claim Seven) shall proceed, but only to the extent that the underlying objects of the conspiracy (Claims One through Six) have survived the motion. Thus, it is dismissed as against Ashcroft, Mueller and Ziglar and shall proceed to the extent it alleges a conspiracy by the remaining defendants to commit the civil rights violations alleged in Claims One, Two, Three and Six.

In sum, the case against Ashcroft, Mueller and Ziglar is dismissed in its entirety. Only Claims Four and Five (and the part of Claim Seven that alleges a conspiracy to commit the wrongs charged in Claims Four and Five) are dismissed as against the other defendants. Counsel for the remaining parties are directed to appear before Chief Magistrate Gold for a status conference on January 30, 2013 at 2:00 PM.

BACKGROUND

A. Factual Allegations

1. *Overview*

The plaintiffs are eight male, non-United States citizens who were arrested on immigration charges following the terrorist attacks on September 11, 2001 ("9/11 attacks"). They were held in immigration custody for periods ranging from three to eight months after receiving final orders of removal or grants of voluntary departure. All but two are Muslims of Middle Eastern, North African, or South Asian origin; the others, natives of India and Nepal, are Hindu. Plaintiffs bring this putative class action on behalf of themselves and a class of male non-

citizens who are Arab or Muslim, or were perceived by the defendants to be Arab or Muslim,[2] and were (1) arrested by the Immigration and Naturalization Service ("INS") or the Federal Bureau of Investigation ("FBI") after September 11, 2001, and charged with immigration violations; (2) treated as "of interest" to the government's terrorism investigation; (3) detained under a blanket "hold-until-cleared" policy, pursuant to which they were held without bond until cleared of terrorist ties by the FBI; and (4) confined in the Metropolitan Detention Center ("MDC") or the Passaic County Jail ("Passaic Jail"). I refer to the putative class as the "Detainees."

2. *The Treatment of the Detainees*[3]

In the aftermath of the 9/11 attacks, the defendants acted together to create and implement a series of policies and practices relating to the identification, detention, and treatment of Arab and Muslim noncitizens who had violated immigration laws (*i.e.*, the Detainees). I refer to this series of policies and practices in the aggregate as the "detention policy." Pursuant to the detention policy, the Detainees were rounded up and detained on their immigration violations so government officials could question them in connection with the ongoing investigation of the 9/11 attacks (the "PENTTBOM investigation"); they were treated as "of interest" to the

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[2] Hereinafter, mention of Arab and/or Muslim individuals includes individuals who were perceived by the defendants to be Arab and/or Muslim.

[3] The factual allegations set forth herein are drawn from the Complaint and two incorporated reports by the Office of the Inspector General to the extent those reports are not contradicted by the allegations of the Complaint. ¶3 n.1. All citations in this opinion preceded by "¶" or "¶¶" refer to paragraphs of the Complaint.

PENTTBOM investigation, which meant that they were deemed to be potential terrorists despite the fact that they had been arrested based on immigration violations, not on suspicion of terrorist activity; they were subject to a hold-until-cleared policy, under which they were held for lengthy periods of times—often for months after they were ordered removed from the country—until the FBI affirmatively cleared them of suspicion of wrongdoing; and they were held until their release in extremely restrictive conditions of confinement. The only aspect of the detention policy challenged in the Complaint is the confinement of the Detainees in harsh conditions ("harsh confinement policy").

The harsh confinement policy, which was created by the DOJ defendants, was a directive to hold the Detainees in restrictive conditions under which they would feel maximum pressure to cooperate with the PENTTBOM investigation. Although this policy mandated that the Detainees' ability to contact the outside world be limited, it did not specify the precise conditions in which they would be held. Rather, the harsh confinement policy was a general mandate, and the exact manner of its implementation was to be determined by officials at the facilities in which the Detainees were held.[4]

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[4] Plaintiffs allege that Ashcroft and Mueller "mapped out ways to exert maximum pressure" on the Detainees, and that Ashcroft "created many of the unreasonable and excessively harsh conditions" under which the Detainees were held, ¶21. These allegations imply that the harsh confinement policy mandated some of the specific conditions that the Detainees endured at the MDC, but the plaintiffs have never specified what those particular conditions were. Moreover, as discussed more fully below, the plaintiffs concede that the specific conditions in which the Detainees were held were created by the MDC defendants in implementing the harsh confinement policy.

The harsh confinement policy was expressly directed at Arab and Muslim noncitizens who had violated immigration laws: It mandated restrictive conditions specifically for Arab and Muslim individuals. In other words, it was discriminatory on its face. This is not to say that no non-Arabs and non-Muslims were held in harsh conditions of confinement as a result of the investigation following the 9/11 attacks. Other individuals may have been held in such conditions pursuant to other policies or for other reasons. However, the harsh confinement policy expressly applied to Arab and Muslim individuals, dictating that those detained under the policy be held in harsh conditions of confinement—not because of any suspected links to terrorism, but because of their race, national origin, and/or religion.

The harsh confinement policy was implemented by the MDC defendants in the following way: The Detainees (the "MDC Detainees") were placed in that facility's Administrative Maximum Special Housing Unit (the "ADMAX SHU"). There, they were confined in tiny cells for over 23 hours a day, provided with meager and barely edible food, and prohibited from moving around the unit, using the telephone freely, using the commissary, accessing MDC handbooks (which explained how to file complaints about mistreatment), and keeping any property, including personal hygiene items like toilet paper and soap, in their cells. Whenever they left their cells, they

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See ¶65 ("The punitive conditions in which MDC Plaintiffs and class members were placed were the *direct result* of the strategy mapped out by Ashcroft and Mueller's small working group.") (emphasis added); Pls.' Opp. Mot. to Dismiss 3, ECF No. 749 ("[I]t does not appear that Ashcroft's small group personally designed the details of every restrictive condition . . . .").

were handcuffed and shackled. Although they were offered the nominal opportunity to visit the recreation area outside of their cells several times a week, the recreation area was exposed to the elements and the MDC Detainees were not offered clothing beyond their standard cotton prison garb and a light jacket. Furthermore, detainees who accepted such offers were often physically abused along the way, and were sometimes left for hours in the cold recreation cell, over their protests, as a form of punishment. As a result, they were constructively denied exercise during the fall and winter.

The MDC Detainees also were denied sleep. Bright lights were kept on in the ADMAX SHU for 24 hours a day (until March 2002), and staff at the MDC made a practice of banging on the MDC Detainees' cell doors and engaging in other conduct designed to keep them from sleeping. They also conducted inmate "counts" at midnight, 3:00 a.m., and 5:00 a.m. While such counts are inherently disruptive—officers are required to see the skin of each inmate being counted, see BOP P.S. 5500.09—the officers "went beyond what was required for the count by kicking the door hard with their boots, knocking on the door at night much more frequently than required, and making n[illegible]gative comments when knocking on the door." ¶39. For example, for the first two or three weeks that one detainee was in the ADMAX SHU, one of the officers walked by about every 15 minutes throughout the night, kicked the doors to wake up the detainees, and yelled things such as, "Motherfuckers," "Assholes," and "Welcome to America." ¶36. In addition, officers used the in-cell camera to watch one detainee, and when he would appear to fall asleep they would kick the cell door.

The MDC Detainees also were subjected to frequent physical and verbal abuse by many of the officers in the

ADMAX SHU. The physical abuse included slamming the MDC Detainees into walls; bending or twisting their arms, hands, wrists, and fingers; lifting them off the ground by their arms; pulling on their arms and handcuffs; stepping on their leg restraints; restraining them with handcuffs and/or shackles even while in their cells; and handling them in other rough and inappropriate ways. The use of such force was unnecessary because the MDC Detainees were always fully compliant with orders and rarely engaged in misconduct. The verbal abuse included referring to the MDC Detainees as "terrorists" and other offensive names, threatening them with violence, cursing at them, insulting their religion, and making humiliating sexual comments during strip-searches.

Both the MDC Detainees and the Detainees held at the Passaic Jail (the "Passaic Detainees") were subjected to unreasonable and punitive strip-searches. The MDC Detainees were strip-searched every time they were removed from or returned to their cells, including before and after visiting with their attorneys, receiving medical care, using the recreation area, attending a court hearing, and being transferred to another cell. They were strip-searched upon each arrival at the MDC in the receiving and discharge area and again after they had been escorted—shackled and under continuous guard—to the ADMAX SHU. These strip-searches occurred even when they had no conceivable opportunity to obtain contraband, such as before and after non-contact attorney visits (to and from which they were escorted—handcuffed and shackled—by a four-man guard). Supp. OIG Rep. at 3. The MDC had no written policy governing when to conduct strip-searches, and they were conducted inconsistently.

The strip-searches were unnecessary to security within the MDC. Rather, they were conducted to punish and humiliate the detainees. Female officers were often present during the strip-searches; the strip-searches were regularly videotaped in their entirety (contrary to BOP policy, see BOP P.S. 5521.05); and MDC officers routinely laughed and made inappropriate sexual comments during the strip-searches.

Officers at the MDC and the Passaic Jail also interfered with the Detainees' ability to practice and observe their Muslim faith. Specifically, when the Detainees requested copies of the Koran, officers delayed for weeks or months before providing them; the MDC and the Passaic Jail failed to provide food that conformed to the Halal diet, despite the Detainees' requests for such food; the MDC had no clock visible to the MDC Detainees, and officers regularly refused to tell them the time of day or the date so they could conform to daily Islam prayer requirements and observe Ramadan; and officers constantly interrupted the Detainees' prayers by banging on their cell doors, yelling and making noise, screaming derogatory anti-Muslim comments, videotaping them, handing out hygiene supplies, and/or telling them to "shut the fuck up" while they were trying to pray.

In addition, most of the MDC Detainees were held incommunicado during the first weeks of their detention (the "communications blackout"). MDC staff repeatedly turned away everyone, including lawyers and relatives, who came to the MDC looking for the MDC Detainees, and thus the MDC Detainees had neither legal nor social visits during this period. This communications blackout lasted until mid-October 2011.

After the initial communications blackout, the MDC Detainees were nominally permitted one call per week to

an attorney. However, MDC officers obstructed Detainees' efforts to telephone and retain lawyers in multiple ways. They were denied sufficient information to obtain legal counsel; although they were given a list of organizations that provide free legal services, the contact information for these organizations was outdated and inaccurate. Legal calls that resulted in a wrong number or busy signal were counted against their quota of calls, as were calls answered by voicemail. Officers frequently asked the MDC Detainees, "Are you okay?," and if the MDC Detainees responded affirmatively, the officers construed this as a waiver of their already-limited privilege to make legal calls. The officers also often brought the phone to the MDC Detainees early in the morning before law offices opened for the day. And they frequently pretended to dial a requested number or deliberately dialed a wrong number and then claimed the line was dead or busy. They then refused to dial again, saying that the Detainee had exhausted his quota.

When the MDC Detainees managed to reach their attorneys by phone, the officers frequently stood within hearing distance of conversations that should have been treated as privileged. Legal visits were non-contact and the MDC Detainees were handcuffed and shackled during the entirety of the visits. The MDC video- and audio-recorded the MDC Detainees' legal visits until April 2002 or later.

The MDC Detainees were nominally permitted one social call per month after the initial communications blackout. However, these calls were just as severely restricted as the legal calls. Social visits were restricted to immediate family, yet even immediate family members were sometimes turned away. As with their legal visits, social visits were non-contact and the MDC Detainees

were handcuffed and shackled during the entirety of the visits.

3. *The Plaintiffs*

a. *Ahmer Iqbal Abbasi*

Abbasi, a citizen of Pakistan and a devout Muslim, entered the United States in 1993 on a visitor visa. He applied unsuccessfully for political asylum, and he remained in the United States illegally after his application was denied. He initially worked as a taxicab driver in Manhattan, saving enough money to purchase a small grocery store, which he sold sometime before 2001.

Abbasi was arrested by the FBI on September 25, 2001. He was interviewed by officials from the FBI, INS, and the New York Police Department ("NYPD"), who gave him no information regarding why he was being detained. The officials asked, among other things, about Abbasi's religious beliefs and practices. Abbasi later learned that his arrest had resulted from a report that a "male[,] possibly Arab" (apparently Abbasi's houseguest) had presented a false Social Security card at the New Jersey Department of Motor Vehicles and had given Abbasi's address as his own. Abbasi was detained in the ADMAX SHU at the MDC.

b. *Anser Mehmood*

Mehmood, a citizen of Pakistan and a devout Muslim, entered the United States in 1989 with his wife, Uzma (Abbasi's sister), and their three children. Mehmood entered on a business visa but remained illegally after the visa expired. He started a trucking business in the United States, making enough money to purchase a home and to send funds to his extended family in Pakistan. Mehmood and his family settled in Bayonne, New Jersey. Another child, an American citizen by birth, was born in

2000. All four of the children attended public school in New Jersey. In May 2001, another of Uzma's brothers, who is an American citizen, submitted an immigration petition for Mehmood and his family. On October 3, 2001, a team of FBI and INS agents visited Mehmood and his wife in their home based on the same report that led to Abbasi's arrest. The agents interviewed Mehmood and his wife about their immigration status, showed them images of people they did not recognize, and asked whether they were involved in jihad. The agents, who sought information on another of Uzma's brothers, who was living in Pakistan, told Mehmood that they needed to arrest either Mehmood or his wife. They arrested Mehmood at his request. Mehmood was detained in the ADMAX SHU at the MDC.

c. *Benamar Benatta*

Benatta, an Algerian citizen and member of the Algerian Air Force, entered the United States on a visitor visa on December 31, 2000. He was granted entry in order to study aviation at Northrop Grumman, but he remained in the United States after the expiration of his visa with the goal of seeking political asylum and gaining employment. On September 5, 2001, six days before the terrorist attacks, he crossed the Canadian border using false documentation with the intent to apply for refugee status there, but was detained by Canadian authorities for investigation. On September 12, he was transported back to the United States and turned over to the INS's custody.

At the Rainbow Bridge border control post in Niagara Falls, New York, Benatta was interrogated by the FBI regarding his false documentation. A report of the interrogation was disseminated, and the INS subsequently commenced removal proceedings. Benatta was served

with a Notice to Appear at immigration court in Batavia, New York, but on September 16, 2001, before the proceeding occurred and before Benatta was able to retain counsel, he was transferred to the ADMAX SHU at the MDC.

d. *Ahmed Khalifa*

Khalifa, a medical student from Egypt, was in the United States for three months on a student visa and had a return ticket to Egypt for October 15, 2001. On September 30, 2001, the apartment he shared with several other Egyptian friends was raided by FBI, NYPD, and INS agents on a tip that several Arabs living at Khalifa's address were renting out a post office box and possibly sending out large quantities of money. The agents initially did not seem interested in Khalifa, although they asked him about his roommates, searched his wallet, and asked if he had had anything to do with the recent terrorist attacks. The agents subsequently determined that they wanted to hold Khalifa as well, and an FBI agent asked an INS agent to arrest Khalifa for working while in the United States on his student visa. Khalifa was detained in the ADMAX SHU at the MDC.

e. *Purna Raj Bajracharya*

Bajracharya, a citizen of Nepal, entered the United States in 1996 on a three-month visa. For the next five years he remained in Queens illegally, working at various odd jobs and sending money to his wife and sons in Nepal. Bajracharya intended to return to Nepal in the fall or winter 2001, and he began videotaping certain New York streets to show his family. An employee of the Queens County District Attorney's Office reported to the FBI on October 25, 2001 that an "Arab male" was videotaping a building that contained the District Attorney's

office and an FBI branch office. District Attorney staff promptly detained and searched him.

During Bajracharya's initial detention and interrogation, which lasted for five hours, FBI and INS agents requested that he bring them to his apartment. He did so, and showed the agents his passport and various identification documents. He admitted that he had overstayed his visa and was illegally present in the United States, and the INS then arrested him. He was detained in the ADMAX SHU at the MDC.

f. *Ibrahim Turkmen*

Turkmen, a Muslim Imam, is a citizen of Turkey. He came to the United States on October 4, 2000 on a six-month tourist visa to visit a friend from Turkey who lived on Long Island. Shortly after his arrival, Turkmen found work at a service station in Bellport, New York. He worked there until January 2001, when he took a job at another service station in the same town. In April 2001, he left that job and began to work part-time for a local Turkish construction company. He spoke regularly to his wife and four daughters, who remained in Turkey, and sent money to support them on a weekly basis.

Turkmen spoke virtually no English when he first arrived in the United States. During his stay, he learned only the words necessary for his limited daily interaction with English-speakers. At the time that he was taken into custody, Turkmen understood very little spoken English, and he could not read English at all.

On October 13, 2001, two FBI agents visited Turkmen at the West Babylon, New York apartment where he was staying with several Turkish friends. The visit was based on a tip from the friends' landlady, who reported to an FBI hotline that she had rented her apartment to several

Middle Eastern men and that she "would feel awful if her tenants were involved in terrorism and [she] didn't call." ¶251. The agents asked Turkmen whether he had any involvement in the 9/11 attacks and whether he had any association with terrorists. They also inquired as to his immigration status. Turkmen had difficulty understanding the questions posed to him in English by the FBI, and no interpreter was provided. Turkmen denied any involvement with terrorists or terrorist activity. The FBI agents accused Turkmen of being an associate of Osama bin Laden and placed him under arrest. He was held at the Passaic Jail.

g. *Akhil Sachdeva*

Sachdeva is a citizen of India and is Hindu. He holds a Bachelor of Arts degree in commerce from the University of Delhi. Since 1995, he has entered the United States for extended periods of time. In December 1998, Sachdeva legally immigrated to Canada. In 1998 he married a woman who owned a gas station in Port Washington, New York. He then briefly returned to Canada until sometime in September or October of 2001, when he returned to the United States to finalize his divorce.

Sometime in late November 2001, an FBI agent visited his ex-wife's gas station looking for a Muslim employee who had been overheard having a conversation in mixed Arabic and English relating to flight simulators and flying. Failing to locate the employee, the agent left a note requesting that Sachdeva's ex-wife contact him. She passed on the request to Sachdeva, who called the agent in early December 2001. The FBI agent asked Sachdeva to come to the agent's offices for an interview, and Sachdeva complied on December 9, 2001. At the interview, two FBI agents questioned Sachdeva about the 9/11 attacks and his religious beliefs and examined his

personal identification. They permitted him to leave, but on December 20, 2001, INS agents arrested Sachdeva at his uncle's apartment. He was detained at the Passaic Jail.

4. *The Claims Alleged*

The Complaint sets forth seven claims for relief. Those claims, which plaintiffs assert on their own behalf and, in most instances, on behalf of the putative class, are: (1) a conditions of confinement claim under the Due Process Clause; (2) an equal protection claim alleging that defendants singled out plaintiffs for harsh conditions of confinement because of their race, religion and/or ethnic or national origin; (3) a claim under the Free Exercise Clause; (4) a free speech and free association claim under the First Amendment; (5) a due process claim alleging interference with access to counsel; (6) a claim under the Fourth and Fifth Amendments for unreasonable and punitive searches; and (7) a claim alleging a conspiracy among the defendants to commit the civil rights violations described in the first six claims, in violation of 42 U.S.C. § 1985.

B. Procedural History

The original complaint in this case was filed on April 17, 2002. The First Amended Complaint was filed on July 27, 2002. The government moved to dismiss on behalf of all named defendants on August 26, 2002, and oral argument on the motion was held on December 19, 2002. On June 2, 2003, the Office of the Inspector General of the United States Department of Justice released a 198-page report entitled "A Review of the Treatment of Aliens Held on Immigration Charges in Connection with the Investigation of the September 11 Attacks" (the "OIG Report"). In light of the OIG Report, the plaintiffs sought leave to amend their complaint,

which I granted. Around that time, the government withdrew from representing the named defendants in their individual capacities, and substitute counsel filed notices of appearance.

On June 18, 2003, the plaintiffs filed the Second Amended Complaint, attaching the April 2003 OIG Report. Supplemental briefs in support of and opposing the motions to dismiss were filed. Then, in December 2003, the OIG filed another report—its 47-page "Supplemental Report on September 11 Detainees' Allegations of Abuse at the Metropolitan Detention Center in Brooklyn, New York" (the "Supplemental OIG Report"; the two OIG reports are referred to collectively as the "OIG Reports"). On September 7, 2004, plaintiffs requested leave to file a Third Amended Complaint, which I granted. The Third Amended Complaint was filed on September 13, 2004. It raised thirty-one claims for relief that, broadly speaking, fell into two categories. The first category of claims stemmed from plaintiffs' contention that the government used plaintiffs' status as noncitizens who had violated immigration laws as an excuse to hold them in jail while it pursued its real interest: determining whether they were terrorists or could help catch terrorists. The second category of claims challenged the conditions of confinement in which the plaintiffs were held.

On June 14, 2006, after another round of briefing, I issued a memorandum and order granting in part and denying in part the motions to dismiss.[5] *Turkmen* v.

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[5] At a hearing on October 21, 2004, I ordered that discovery could begin on claims involving the conditions of confinement and the use of excessive force. The MDC Defendants moved to dismiss those claims as against them, arguing that they were entitled to qualified immunity. That motion was denied by order dated December 3,

Ashcroft, No. 02 Civ. 2307, 2006 WL 1662663 (E.D.N.Y. June 14, 2006) ("*Turkmen I*"). I dismissed the entire first category of claims and let the majority of claims in the second category proceed. Remaining after the motions to dismiss were: (1) the claim that the plaintiffs held in the MDC were subject to punitive conditions of confinement in contravention of their substantive due process rights; (2) the claim that the plaintiffs held in the MDC were unreasonably strip-searched in violation of the Fourth and Fifth Amendments; (3) the claim that defendants interfered with plaintiffs' religious practices in violation of the Free Exercise Clause; (4) the claim that defendants violated plaintiffs' due process rights by assigning them to the ADMAX SHU without process of any sort; (5) the claim that the defendants singled out the plaintiffs for harsh treatment in detention because of their race, religion and/or ethnic or national origin in violation of the Equal Protection Clause; (6) the Due Process and conversion claims arising from defendants' confiscation of several plaintiffs' personal property; (7) the claim that defendants imposed a communications blackout during plaintiffs' detention in violation of plaintiffs' First Amendment and due process rights; and (8) several Federal Tort Claims Act claims and excessive force claims not relevant here.[6]

The Second Circuit ruled on the appeal of *Turkmen I* in *Turkmen* v. *Ashcroft*, 589 F.3d 542 (2d Cir. 2009)

2004, see ECF No. 149, and a motion for reconsideration and vacatur of the December 3, 2004 order was denied on January 14, 2005. Familiarity with that order is presumed. Insofar as the issues addressed in that order are affected by the Supreme Court's decision in *Iqbal*, 556 U.S. at 662, I reconsider them here.

[6] Familiarity with *Turkmen I* and its underlying facts is presumed.

("*Turkmen II*"). In the period between *Turkmen I* and *Turkmen II*, the Supreme Court issued its decision in *Ashcroft* v. *Iqbal*, 556 U.S. 662 (2009). *Iqbal* dramatically altered the legal landscape in two ways relevant to my decision in *Turkmen I*. First, it revolutionized federal pleading standards, discarding the traditional "no set of facts" standard established by *Conley* v. *Gibson*, 355 U.S. 41, 45-46 (1957), and adopting a new "plausibility" standard. *Iqbal*, 556 U.S. at 678-80. In addition, it eliminated the doctrine of supervisory liability for *Bivens* claims. *Id.* at 676-77. Accordingly, the Second Circuit vacated my rulings denying the motions to dismiss the conditions of confinement claims, which had applied the outdated pleading standard, and remanded the case for reconsideration of those claims. *Turkmen II*, 589 F.3d at 547.[7]

On remand after *Turkmen II*, plaintiffs sought leave to amend, which I granted on August 26, 2010. The instant complaint, entitled the Fourth Amended Complaint (the "Complaint"), was filed on September 13, 2010. The Complaint includes six claims that were originally raised in *Turkmen I* and a new claim never before raised. All defendants have moved to dismiss.

DISCUSSION

A. The Applicable Legal Principles

1. *The Motion to Dismiss Standard*

The pleading landscape has changed substantially since this case was first before me. Instead of holding the Complaint to the standard set by *Conley*, 355 U.S. at 45-46 (1957), under which a claim could not be dismissed

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[7] The Second Circuit also addressed plaintiffs' challenge to my dismissal of several other claims, and it affirmed the dismissal of those claims.

unless the court concluded that there was no set of facts on which the plaintiff would be entitled to relief, following *Iqbal*, 556 U.S. at 678-80, I must now decide whether the plaintiffs' allegations, if true, state a claim that is plausible on its face. A claim is facially plausible when "the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* at 678. Although the plausibility standard does not require plaintiffs to show that their desired inferences are more likely than not the correct inferences to draw, the facts alleged must establish "more than a sheer possibility that a defendant has acted unlawfully." *Id.* A complaint that "pleads facts that are 'merely consistent with' a defendant's . . . 'stops short of the line between possibility and plausibility of entitlement to relief.'" *Id.* (quoting *Bell Atl.* v. *Twombly*, 550 U.S. 544, 557 (2007)).

Although in considering a motion to dismiss I am required to accept as true the factual assertions in a complaint, see *Zinermon* v. *Burch*, 494 U.S. 113, 118 (1990), I am "not bound to accept as true a legal conclusion couched as a factual allegation." *Iqbal*, 556 U.S. at 678 (internal quotation marks omitted). Thus, I begin my analysis of the facial plausibility of the asserted claims by identifying, and casting aside, "pleadings that, because they are no more than conclusions, are not entitled to the assumption of truth." *Id.* at 679. I then consider only the well-pleaded factual allegations in the complaint, and assuming their truth, determine whether they plausibly suggest the plaintiffs' entitlement to relief. See *id.* at 681.

2. *Supervisory Liability After* Iqbal

Prior to the Supreme Court's decision in *Iqbal*, an official could be held liable for a constitutional tort under a

theory of "direct liability" as well as "supervisory liability." Direct liability is liability for "caus[ing] an injury while possessing the mens rea required [for a] particular constitutional [tort]." Comment, *Supervisory Liability After* Iqbal: *Decoupling* Bivens *from Section 1983*, 77 U. Chi. L. Rev. 1401, 1408 (2010). In other words, an individual becomes directly liable for a constitutional tort (he becomes a "primary actor") when he acts in a way that satisfies each of the elements of that tort. For example, a defendant is directly liable for an equal protection violation if he (1) injures a plaintiff (causation) (2) because of discriminatory animus (mens rea). And if a defendant's (1) deliberately indifferent failure to act in the face of a known risk to an inmate's safety (mens rea) (2) causes injury to that inmate (causation), the defendant will be liable for an Eighth Amendment violation. As is evident, the elements that must be satisfied for a defendant to be held directly liable for a tort depend on the tort alleged.

In contrast, supervisory liability is incurred when a supervisory defendant (a "secondary actor") is in some way "personally involved" with a primary actor's constitutional tort and is a cause of the plaintiff's injury. In the Second Circuit, personal involvement is understood broadly. A government official is personally involved in a constitutional tort if he: (1) participated directly in the alleged violation; (2) failed to remedy the violation after being informed of the violation through a report or appeal; (3) created a policy or custom, or allowed the continuance of such a policy or custom, under which unconstitutional practice occurred; (4) was grossly negligent in supervising a subordinate who committed the unlawful act; or (5) exhibited deliberate indifference to an individual's constitutional rights by failing to act on information indicating the unconstitutional act was occurring. *Colon*

v. *Coughlin*, 58 F.3d 865, 873 (2d Cir. 1995) (citing *Wright* v. *Smith*, 21 F.3d 496, 501 (2d Cir. 1994)).

For supervisory liability to exist, the secondary actor's behavior need not satisfy each of the elements of the constitutional tort. Rather, as long as a primary actor committed a constitutional tort and the secondary actor was personally involved in that tort (in any of the five ways set forth in *Colon*) and was a cause of the plaintiff's injury, the secondary actor may be held liable. The elements necessary to incur supervisory liability do not vary with the constitutional tort alleged. Thus, the conduct of a secondary actor sued for supervisory liability will be judged under the same standard for personal involvement, regardless of whether the primary actor's tort arises under the Equal Protection Clause or the Fourth Amendment.

Supervisory liability, therefore, extends liability to persons who cannot be held directly liable. While direct liability exists only when all the elements of the tort in question have been established, supervisory liability can operate to relax a mens rea element, allowing liability against a supervisory defendant who does not satisfy that element of the tort. For example, a supervisor who lacked discriminatory intent can never be held directly liable for an equal protection violation, but if he "was grossly negligent in supervising a subordinate" who committed an equal protection violation, he may be held liable on a theory of supervisory liability. Rather than act with the intent to discriminate, the supervisory defendant need only have been negligent in the discharge of his supervisory responsibilities.

Supervisory liability does not, however, relax all of the elements of a constitutional tort. One common element of any recognized constitutional tort is that the defendant

caused the plaintiff's injury. Supervisory liability does not dispense with the need to show an affirmative causal link between the supervisor's actions (or inactions) and the injury. See, *e.g.*, *Poe* v. *Leonard*, 282 F.3d 123, 140 (2d Cir. 2002) (holding that §1983's causation requirement applies when invoking supervisory liability); *Iqbal*, 556 U.S. at 675 ("In the limited settings where *Bivens* does apply, the implied cause of action is the 'federal analog to suits brought against state officials under [§1983].'") (quoting *Hartman* v. *Moore*, 547 U.S. 250, 254 n.2 (2006)). In other words, regardless of whether a defendant is sued under a theory of direct or supervisory liability, he must have caused the plaintiff's injury.

In *Iqbal*, the Supreme Court, in no uncertain terms, eliminated supervisory liability in *Bivens* claims. *Iqbal*, 556 U.S. at 676-77. According to the Court, "where masters do not answer for the torts of their servants[,] the term 'supervisory liability' is a misnomer." *Id.* at 677. Thus, after *Iqbal*, in order for a plaintiff to assert a valid *Bivens* claim against a government official, he "must plead that each Government-official defendant, through the official's own individual actions, has violated the Constitution." *Id.* at 676. In other words, only direct liability remains for *Bivens* claims.

This is not to say that supervisors are now immune from *Bivens* actions. A supervisor, just as any defendant, can be held directly liable for a constitutional tort if his actions satisfy the elements of that tort. However, if a supervisor cannot be held directly liable for a constitutional tort, that is, if his conduct has not satisfied the elements of that tort, the doctrine of supervisory liability is now unavailable to relax those elements.

Nor does the elimination of supervisory liability spell the end of *Bivens* liability premised upon a defendant's

inaction if such inaction satisfies the elements of a tort. As *Colon* makes clear, nonfeasance—just like malfeasance—*can* be a basis for liability, and nothing in *Iqbal* changed this rule. *D'Olimpio* v. *Crisafi*, 718 F. Supp. 2d 340, 347 (S.D.N.Y. 2010) ("*Colon*'s bases for liability are not founded on a theory of *respondeat superior*, but rather on a recognition that 'personal involvement of defendants in alleged constitutional deprivations' can be shown by nonfeasance as well as misfeasance.'" (quoting *Colon*, 58 F.3d at 873)); see, *e.g.*, *Bell* v. *Wolfish*, 441 U.S. 520 (1979) (premising liability upon failure to protect from privately inflicted harms); cf. *City of Okla. City* v. *Tuttle*, 471 U.S. 808 (1985) (premising § 1983 liability of municipality upon failure to train its employees).

The defendants argue that, of the five forms of personal involvement described by *Colon*, only the first and the first half of the third survive *Iqbal*. The Second Circuit has never addressed this precise issue, and the district courts in this Circuit, as well as the other courts of appeals, have grappled with this question and reached conflicting results. Compare *Bellamy* v. *Mount Vernon Hosp.*, No. 07 Civ. 1801, 2009 WL 1835939, at *5-6 (S.D.N.Y. June 26, 2009) (dismissing deliberate indifference claim against a supervisor, holding that *Iqbal* abrogated categories of supervisory liability that do not involve "active conduct"), with *D'Olimpio*, 718 F. Supp. 2d at 347 (holding that each of the five *Colon* categories for personal liability of supervisors may still apply as long as they are consistent with the elements of particular constitutional tort alleged); see also *Starr* v. *Baca*, 652 F.3d 1202, 1207 (9th Cir. 2011) superseding, 633 F.3d 1191 (9th Cir. 2011), rehearing en banc denied, 659 F.3d 850 (9th Cir. 2011) (holding that plaintiff may state a claim against a supervisor for deliberate indifference based upon the

supervisor's knowledge of and acquiescence in unconstitutional conduct by his or her subordinates);[8] *Argueta* v. *U.S. Immigration and Customs Enforcement*, 643 F.3d 60, 72 (3d Cir. 2011) (assuming, without holding, that a federal supervisory official may be liable in certain circumstances even though he or she did not directly participate in the underlying unconstitutional conduct); *Santiago* v. *Warminster Tp.*, 629 F.3d 121, 130 n.8 (3d Cir. 2010) (noting that *Iqbal* may restrict the incidents in which a "failure to supervise" will result in liability, but refraining from deciding the question); *Dodds* v. *Richardson*, 614 F.3d 1185, 1199 (10th Cir. 2010) (holding a defendant-supervisor can be held liable if he "creates, promulgates, implements, or in some other way possesses responsibility for the continued operation of a policy" that causes a constitutional tort).

I don't find this debate over what "remains" of the *Colon* standards for personal involvement after *Iqbal* to be useful. *Iqbal* removed supervisory liability from *Bivens* claims. This means that liability can no longer be shown by alleging *simply* personal involvement under *Colon* (and causation of the plaintiff's injury) *regardless* of the kind of constitutional tort alleged. Direct liability is now the only option in *Bivens* claims—for supervisors and supervisees—and a plaintiff must now allege that the defendant's conduct satisfies each of the elements of the tort alleged. But the demise of supervisory liability in *Bivens* claims does not mean that the forms of personal

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[8] Dissenting from denial of rehearing en banc, Judge O'Scannlain, joined by seven judges, argued that the majority opinion "conflicts with *Iqbal* in . . . its far-reaching conclusions regarding supervisory liability." *Starr* v. *Cnty. of Los Angeles*, 659 F.3d 850, 855 (9th Cir. 2011).

involvement under *Colon* can never constitute a basis for *direct* liability. If a defendant's personal involvement under *Colon* satisfies the elements of a constitutional tort, that involvement may trigger liability.

For example, because the mens rea element of an Eighth Amendment violation is deliberate indifference, a supervisor—like any other defendant—can be held directly liable for deliberate indifference (the fifth form of personal involvement set forth in *Colon*), assuming his conduct meets the other elements of the tort. And, as *Iqbal* itself discussed, because the mens rea element of an equal protection claim is discriminatory intent, "purpose rather than knowledge is required to impose *Bivens* [direct] liability on [a] subordinate for unconstitutional discrimination; the same holds true for an official charged with violations arising from his or her superintendent responsibilities." *Iqbal*, 556 U.S. at 677. Accordingly, if a supervisor, for example, created a policy or custom directing unconstitutional conduct (the third form of personal involvement set forth in *Colon*) because of discriminatory animus, and that policy or custom caused plaintiff's injury, a supervisor may be held liable for that conduct. What is different after *Iqbal* is that the guiding question is no longer simply whether a plaintiff has pleaded personal involvement under *Colon* but whether a plaintiff has pleaded each of the elements of the constitutional tort alleged. The "factors necessary to establish a *Bivens* violation will vary with the constitutional provision at issue," *id.* at 676, and what "remains" of *Colon* depends on the constitutional provision at issue.

3. *The Qualified Immunity Standard*

Government officials performing discretionary functions are "shielded from liability for civil damages insofar as their conduct does not violate clearly established stat-

utory or constitutional rights of which a reasonable person would have known." *Harlow* v. *Fitzgerald*, 457 U.S. 800, 818 (1982). In determining whether a right was clearly established, courts look to whether (1) the right was defined with reasonable clarity; (2) Supreme Court or Second Circuit precedent has confirmed the existence of the right; and (3) a reasonable defendant would have understood from the existing law that his conduct was unlawful. *Young* v. *Cnty. of Fulton*, 160 F.3d 899, 903 (2d Cir. 1998). The determination of whether the right at issue was clearly established "must be undertaken in light of the specific context of the case, not as a broad general proposition." *Saucier* v. *Katz*, 533 U.S. 194, 201 (2001), abrogated on other grounds by *Pearson* v. *Callahan*, 555 U.S. 223 (2009). An officer is entitled to qualified immunity even when his actions were unlawful provided the constitutionality of his conduct was objectively debatable. See *Anderson* v. *Creighton*, 483 U.S. 635, 640 (1987); *Taravella* v. *Town of Wolcott*, 599 F.3d 129, 135 (2d Cir. 2010) (holding that "consideration of whether it was 'objectively reasonable' for a defendant to believe his actions were lawful . . . is indispensable" to the qualified immunity analysis); *Danahy* v. *Buscaglia*, 134 F.3d 1185, 1190 (2d Cir. 1998) (stating that immunity applies whenever "officers of reasonable competence could disagree on the legality of defendant's actions") (internal quotation marks omitted). There was a time when the qualified immunity analysis had a prescribed order of operations: judges were directed to first decide whether the defendant's conduct (as alleged by the plaintiff) violated a constitutional right; and only if the answer to that question was "yes" could they proceed to determine whether the right was "clearly established" at the time of the violation. *Saucier*, 533 U.S. at 201 (emphasis added). However, following the Supreme Court's decision in *Pearson*,

555 U.S at 242, courts now have discretion to address those questions in reverse order, and to refrain from deciding the first if the asserted right was not clearly established. See *Dominger* v. *Nichoff*, 642 F.3d 334, 345 (2d Cir. 2011).

B. Claims One and Six: Conditions of Confinement

The MDC Detainees allege that the creation and the implementation of the harsh confinement policy violated their Fifth Amendment substantive due process rights. They assert Claim One against all defendants; Claim Six asserts a Fifth Amendment due process claim against only the MDC Defendants based on the strip searches.[9] Both are *Bivens* claims seeking damages.[10]

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[9] Although Claim Six focuses solely on the strip searches and does not name the DOJ Defendants, the factual allegations incorporated by reference into Claim One embrace the strip search allegations. I deem Claim One to allege, *inter alia*, strip searches in violation of the Fifth Amendment against the DOJ Defendants.

[10] Although, as discussed more fully below in relation to the free exercise-based *Bivens* claim, "the Supreme Court has warned that the *Bivens* remedy is an extraordinary thing that should rarely if ever be applied in 'new contexts'," *Arar* v. *Ashcroft*, 585 F.3d 559, 582 (2d Cir. 2009) (en banc) (quoting *Corr. Servs. Corp.* v. *Malesko*, 534 U.S. 61, 69 (2001)). The conditions-of-confinement claims do not present a new context. The Second Circuit has long assumed that mistreatment claims like those alleged here give rise to a *Bivens* claim. See *Arar*, 585 F.3d at 597 (Sack, J., dissenting) (citing cases). Moreover, as Judge Sack pointed out in dissent in *Arar*, when the Second Circuit reviewed essentially identical claims in *Iqbal*, it "did not so much as hint either that a *Bivens* remedy was unavailable or that its availability would constitute an unwarranted extension of the *Bivens* doctrine." *Id.* Indeed, even the en banc majority in *Arar*, which concluded that extraordinary rendition was a new context (into which the *Bivens* remedy would not be extended), acknowledged that

1. *The Elements of the Claim*

I consider plaintiffs' substantive due process claim under the standard applicable to pretrial detainees. See *Turkmen I*, 2006 WL 1662663, at *31-32, aff'd in part, vacated in part, remanded, 589 F.3d 542 (2d Cir. 2009). For pretrial detainees, such a claim is governed by the Due Process Clause of the Fifth Amendment. *Bell* v. *Wolfish*, 441 U.S. 520, 535 n.16 (1979). In an action challenging conditions or restrictions of pretrial detention he has *purposefully* imposed, a *Bivens* defendant may be held liable if (1) with the intent to punish (mens rea) (2) he engaged in conduct that caused the conditions or restrictions that injured the plaintiff (causation). *Id.* at 535; *Iqbal* v. *Hasty*, 490 F.3d 143, 169 (2d Cir. 2007), rev'd by *Ashcroft* v. *Iqbal*, 556 U.S. 662 (2009). If the plaintiff does not allege that the defendant verbally expressed an intent to punish, punitive intent may be inferred from the nature of the conditions or restraints allegedly imposed. Specifically, a court may consider "'whether an alternative purpose to which [the condition] may rationally be connected is assignable for it, and whether it appears excessive in relation to the alternative purpose assigned [to it].'" *Wolfish*, 441 U.S. at 538 (quoting *Kennedy* v. *Men-*

Bivens claims are already available for the harsh conditions of confinement alleged here. See *id.* at 580 ("In the small number of contexts in which courts have implied a *Bivens* remedy, it has often been easy to identify both the line between constitutional and unconstitutional conduct, and the alternative course which officers should have pursued. The guard who beat a prisoner should not have beaten him; . . . and the immigration officer who subjected an alien to multiple strip searches without cause should have left the alien in his clothes."). Moreover, in *Turkmen I*, I rejected defendants' arguments that a *Bivens* remedy should not be extended, and I see no reason to revisit that determination here. 2006 WL 1662663, at *29.

doza-Martinez, 372 U.S. 144, 168-169 (1963)). Thus, "if a particular condition or restriction of pretrial detention is reasonably related to a legitimate governmental objective, it does not, without more, amount to 'punishment.'" *Id.* at 539. In contrast, "if a restriction or condition is not reasonably related to a legitimate goal—if it is arbitrary or purposeless—a court permissibly may infer that the purpose of the governmental action is punishment that may not constitutionally be inflicted upon detainees *qua* detainees." *Id.*

With respect to conditions of pretrial detention not alleged to be *purposefully* caused by the defendants, which I refer to as environmental conditions, a *Bivens* defendant may be held liable on a substantive due process claim if he (1) caused injury to the plaintiff through his (2) deliberate indifference to a substantial risk that the plaintiff would be deprived of a basic human need, such as food, clothing, shelter, medical care, sleep, and reasonable safety. See *Iqbal*, 490 F.3d at 169; *Caiozzo* v. *Koreman*, 581 F.3d 63, 69 (2d Cir. 2009); *Farmer* v. *Brennan*, 511 U.S. 825, 837 (1994); *DeShaney* v. *Winnebago Cnty. Dep't. of Soc. Servs.*, 489 U.S. 189, 200 (1989). A defendant who is deliberately indifferent to a risk must be subjectively aware of that risk. *Caiozzo*, 581 F.3d at 71.

2. *The Sufficiency of the Allegations*

The plaintiffs allege that the defendants violated their substantive due process rights. Specifically, they complain that the defendants caused them to be, *inter alia*, constructively denied the opportunity to exercise; denied sleep; repeatedly placed in handcuffs and shackles; deprived of hygienic implements, such as soap and toilet paper; subjected to extremely cold conditions; deprived of sufficient food; frequently verbally and physically

abused; and repeatedly strip-searched (collectively, the "challenged conditions").

The plaintiffs advance different theories of liability with respect to the DOJ defendants and the MDC defendants. They seek to hold the MDC defendants liable for creating, or being deliberately indifferent to, the challenged conditions. In contrast, they seek to hold the DOJ defendants liable for creating the harsh confinement policy, which directed that the Detainees be held in restrictive conditions such that they felt maximum pressure to cooperate with law enforcement. Although that policy did not expressly contemplate the specific challenged conditions, plaintiffs allege that it *caused* those conditions because the challenged conditions were created in the implementation of the harsh confinement policy.

Consistent with my ruling in *Turkmen I*, 2006 WL 1662663, at *32-33, the defendants do not contest that the purpose of the challenged conditions was to punish and/or that the challenged conditions presented a serious risk of depriving the Detainees of their basic human needs.[11] Instead, the defendants, citing different rationales, argue that they should not be held responsible for injuries caused by those conditions. In other words, at issue on these motions to dismiss is not whether *someone* may be held liable in a *Bivens* action for the challenged conditions; it is whether each defendant is a proper defendant in such an action.

a. *The DOJ Defendants*

Plaintiffs contend that the DOJ defendants should be held liable because (1) with the intent to punish the De-

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[11] Accordingly, I do not revisit the question of whether the challenged conditions evince an intent to punish.

tainees (2) they created the harsh confinement policy, which caused the challenged conditions that injured the Detainees. The DOJ defendants contend that, because the policy did not itself direct unconstitutional action, it cannot be the basis for imposing liability now that supervisory liability has been eliminated. In other words, these defendants argue that to hold them liable simply because their facially constitutional policy was unconstitutionally applied would be to hold them responsible not for their own acts but for the acts of their supervisees.

I agree that holding the DOJ defendants liable *solely* on the basis that the MDC defendants unconstitutionally applied their facially constitutional policy would be the equivalent of imposing *respondeat superior* liability—a form of supervisory liability discarded in *Iqbal*. Indeed, one could describe almost *any* act taken by the MDC defendants as having been caused by the DOJ defendants, and holding the latter responsible for the former's acts without more than but-for causation would make a master responsible for the acts of his servants. Cf. *City of Okla. City* v. *Tuttle*, 471 U.S. 808, 823 (1985) ("Obviously if one retreats far enough from a constitutional violation some municipal 'policy' can be identified behind almost any such harm inflicted by a municipal official; for example, [a city police officer] would never have killed [the plaintiff] if [the city] did not have a 'policy' of establishing a police force."); *Connick* v. *Thompson*, 131 S. Ct. 1350, 1365 (2011) (finding that a "stringent standard of fault" is necessary to connect a municipal policy with municipal employees' unconstitutional acts "lest municipal liability under § 1983 collapse into *respondeat superior*.").

However, a substantive due process violation requires more than simply but-for causation. It also requires an intent to punish, and when punitive intent motivates a

facially constitutional policy that is implemented by the creation of unconstitutionally punitive conditions of confinement, imposing liability upon the policymaker is very different from imposing *respondeat superior* liability. Cf. *Brock* v. *Wright*, 315 F.3d 158, 167 (2d Cir. 2003) (permitting liability where unconstitutional acts were taken in implementation of policy that was ambiguous on its face but was interpreted and intended by the policymaker to call for those acts). A facially constitutional policy that was expressly intended to cause the kind of constitutional violation it ultimately caused constitutes behavior upon which *direct* liability may properly be premised.

I conclude that plaintiffs have failed to state a claim that the DOJ defendants violated their substantive due process rights because the Complaint does not plausibly plead that the DOJ defendants possessed punitive intent. Although an inference of punitive intent may be drawn from the conditions themselves, in evaluating the sufficiency of the allegations against the DOJ defendants it is useful to bear in mind what the plaintiffs do *not* allege. They do not allege that the DOJ defendants intended that the MDC defendants create the punitive and abusive conditions in which the plaintiffs were detained. Nor do they allege that the DOJ defendants were even aware of those conditions. Rather, they simply contend that the unconstitutional conditions of confinement were the "direct result" of the DOJ defendants' harsh confinement policy, and particularly of their directive to "exert maximum pressure on" the detainees, who "needed to be encouraged in any way possible to cooperate." ¶61. Plaintiffs' counsel contended at oral argument that those marching orders "encourage[d] illegal means" of obtaining detainee cooperation, which in fact were used, and that encouragement supports an inference at this stage

that these defendants intended the resulting detainee abuse. Oral Arg. Tr. 41, ECF No. 759. In effect, and plaintiffs' counsel conceded as much at oral argument, plaintiffs would have me infer from the DOJ defendants' failure to specify that the harsh confinement policy should be carried out *lawfully* that they intended to punish the plaintiffs. This I cannot reasonably do.

"Generally, a supervisory official is entitled to assume that subordinates will pursue their responsibilities in a constitutional manner." *Smiley by Smiley* v. *Westby*, No. 87 Civ. 6047, 1994 WL 519973, at *8 (S.D.N.Y. Sept. 22, 1994); cf. *Al-Jundi* v. *Estate of Rockefeller*, 885 F.2d 1060, 1065-66 (2d Cir. 1989) (defendant could not be held liable for delegating power to supervisee who acted unconstitutionally in exercising that power because defendant could rely on supervisee to adhere to the Constitution). The DOJ defendants were entitled to expect that their subordinates would implement their directions lawfully, and I cannot reasonably infer that the failure to make that expectation explicit suggests punitive intent. Accordingly, I grant the motion to dismiss plaintiffs' conditions-of-confinement claims with respect to these defendants.

b. *The MDC Defendants*

The plaintiffs seek to hold the MDC defendants responsible for the challenged conditions, some of which were created as a matter of express policy (*e.g.*, regular handcuffing and shackling, deprivation of hygienic implements, strip-searches, constructive denial of exercise) and others of which were not (*e.g.*, verbal and physical abuse, sleep deprivation). I refer to the former group of conditions as the "official conditions" and the latter group as the "unofficial abuse." With respect to the official conditions, the plaintiffs argue that the MDC defendants

(1) created the challenged conditions (2) with the intent to punish. With respect to the unofficial abuse, the plaintiffs contend that all the MDC defendants except Zenk[12] (1) caused plaintiffs' injuries through (2) their deliberate indifference to the risk that such abuse would occur.[13]

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[12] Plaintiffs "do not seek to hold Defendant Zenk responsible for the abuses that occurred [i]n the AMDAX [SHU] beyond those imposed as a matter of policy." Pls.' Mem. Opp. Mot. to Dismiss 41 n.15, ECF No. 749. In addition, plaintiffs do not assert against Zenk any claims arising from activities prior to April 22, 2002, the date he became Warden of the MDC.

[13] The archetypal substantive due process claim for environmental conditions is a claim against prison officials for failing to protect the plaintiff against *privately* inflicted harms. As the Supreme Court has explained, government actors do not generally have a duty to protect persons from private harms, but when the government takes a citizen into its care, such a "duty to assume some responsibility for his safety and general well-being" arises. *DeShaney*, 489 U.S. at 200. The "rationale for this principle is simple enough: when the State by the affirmative exercise of its power so restrains an individual's liberty that it renders him unable to care for himself, and at the same time fails to provide for his basic human needs—*e.g.*, food, clothing, shelter, medical care, and reasonable safety—it transgresses the substantive limits on state action set by the Eighth Amendment and the Due Process Clause." *Id.* Accordingly, when a government official is deliberately indifferent to known risks to a prisoner's basic human needs and yet fails to discharge his duty to protect, he may be held liable under the Substantive Due Process Clause. See *Wolfish*, 441 U.S. at 335-36. In this case, plaintiffs allege that the MDC defendants failed to protect them from harms inflicted by their subordinates—*i.e.*, not private individuals but government employees under their supervision. The logic of *Deshaney* and *Wolfish* applies with just as much force to this kind of claim. Thus, because a government official may be held liable for his inaction when he is deliberately indifferent to the known risk of private harms to a prisoner, he may be held liable when he is deliberately indifferent to a known risk of harm at the hands of his own subordinates. This is not supervisory liability or even liability that arises

The Complaint states a plausible claim against all of the MDC defendants for the official conditions. The plaintiffs allege that Hasty ordered the creation of the ADMAX SHU and ordered two of his subordinates, Lopresti and Cuciti, to design extremely restrictive conditions of confinement for those assigned to it; that Cuciti and Lopresti created the written policy setting forth the official conditions; that Hasty and Sherman then approved and implemented that written policy; and that, when Zenk replaced Hasty, he approved and implemented the conditions created under Hasty's watch. These allegations establish that each defendant was a cause of the official conditions, and the conditions themselves permit an inference of punitive intent with respect to every defendant because every defendant had a hand in creating or implementing them. See *Wolfish*, 441 U.S. at 538-39.

The plaintiffs have also stated a claim against all of the MDC defendants for the unofficial abuse. No one questions that the abuse constituted a grave risk to plaintiffs' reasonable safety, and the Complaint plausibly alleges that all of the defendants were deliberately indifferent to—that is, subjectively aware of—that risk and yet did nothing to mitigate it. Indeed, plaintiffs allege that Hasty "was made aware of the abuse that occurred through inmate complaints, staff complaints, hunger strikes, and suicide attempts," ¶24; Zenk and Sherman made rounds in the ADMAX SHU and were aware of the abusive con-

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from the discharge of supervisory responsibilities. The same theory of liability applies identically to supervisors and subordinates alike: When an officer is deliberately indifferent to a known risk of any threat (public *or* private) to a prisoner's basic human needs and fails to act to mitigate that risk, he may be liable.

ditions there; Lopresti was frequently present in the ADMAX SHU, regularly reviewed documentation of some of the abuses, and received numerous complaints from the Detainees about abuse and mistreatment; Cuciti made rounds in the ADMAX SHU, reviewed logs created by the unit, and heard complaints from the Detainees about the unofficial abuse; and all of the MDC defendants failed to take steps to rectify the abuse. These specific factual allegations suffice to raise the reasonable inference that the MDC defendants had the requisite mens rea and that their inaction in the face of the unofficial abuse caused plaintiffs' injuries.

3. *Qualified Immunity*

The defendants are not entitled to qualified immunity. It was clearly established in 2001 that punitive conditions of confinement could not be imposed upon unconvicted detainees. *Iqbal*, 490 F.3d at 169; *Turkmen I*, 2006 WL 1662663, at *34. See *Bell*, 441 U.S. at 538; *Cuoco* v. *Moritsugu*, 222 F.3d 99, 106 (2d Cir. 2000). The unique context of the 9/11 attacks did not render the law unclear. As the Second Circuit has observed, the "right not to be subjected to needlessly harsh conditions of confinement" does "not vary with surrounding circumstances." *Iqbal*, 490 F.3d at 159. This right was among those that were "clearly established prior to 9/11, and [it] remained clearly established even in the aftermath of that horrific event." *Id.* at 160.

The MDC defendants argue that even if the law was clearly established, they should be granted qualified immunity because, in holding the plaintiffs in the ADMAX SHU, they were following the facially valid orders of their superiors at the BOP. Specifically, they suggest that their BOP superiors designated the plaintiffs for restrictive confinement, and that they were entitled to as-

sume that their BOP superiors did so because they suspected the plaintiffs of links to terrorism. Therefore, they contend, reasonable officers in their position would not have known that their behavior violated clearly established law. But this argument conflicts with the express allegations in the Complaint[14] that the harsh confinement policy was facially discriminatory and that the MDC defendants were informed that law enforcement had no information linking the plaintiffs to terrorism. Accordingly, I find the argument without merit and deny qualified immunity.

C. Claim Two: Equal Protection Claims

Plaintiffs bring a *Bivens* claim for violation of their equal protection rights under the Due Process Clause of the Fifth Amendment.[15] They contend that defendants created and implemented the harsh confinement policy because of their race, religion, and national origin. Specifically, plaintiffs assert that the harsh confinement poli-

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[14] The defendants contend that the plaintiffs cannot partially incorporate the OIG Reports, *i.e.*, that they must incorporate them wholesale rather than only to the extent they do not conflict with the allegations of the Complaint. I reject this suggestion. There is a difference between disputing the words that appear in an incorporated document (impermissible) and disputing the truth of those words (permissible). Although plaintiffs could not incorporate the OIG Reports and then allege that they do not say what they plainly say, they need not incorporate all of the allegations in the Reports for their truth. See *DiFolco* v. *MSNBC Cable L.L.C.*, 622 F.3d 104, 111 (2d Cir. 2010).

[15] The availability of a *Bivens* remedy for violations of the Equal Protection Clause has been conclusively established. See *Davis* v. *Passman*, 442 U.S. 228 (1979).

cy was facially discriminatory, as it was expressly directed at Muslim and Arab men.[16]

1. *The Elements of the Claim*

To prevail at this stage on their equal protection claim, plaintiffs must plausibly allege that defendants' (1) discriminatory animus (2) caused plaintiffs' injuries. *Washington* v. *Davis*, 426 U.S. 229, 240 (1976); *Hayden* v. *Cnty. of Nassau*, 180 F.3d 42, 48 (2d Cir. 1999); cf. *Hartman* v. *Moore*, 547 U.S. 250, 259-61 (2006) (explaining, in the context of First Amendment retaliatory discharge claims, that discriminatory animus is insufficient if the complained-of adverse action would have occurred anyway). They may plead discriminatory animus in any of three ways. First, they may plead that defendants adopted or implemented a policy that classifies on the basis of race, religion, or national origin. A "policy is discriminatory on its face if it expressly classifies persons" on the basis of such an unlawful characteristic. *Hayden*, 180 F.3d at 48. Second, they may plead that a facially neutral policy was applied to them in an intentionally discriminatory fashion. *Id.* Third, they may plead that a facially neutral policy was motivated by discriminatory animus and its application resulted in a discriminatory effect. *Id.*

Plaintiffs follow the first route, contending that the harsh confinement policy, which the DOJ defendants created, expressly dictated that Arab and Muslim noncitizens should be detained in restrictive conditions. Oral

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[16] Because the Passaic plaintiffs were not injured by the alleged discrimination—they were held in the general population of the Passaic Jail and thus cannot claim that they were held in harsher conditions than they would have been held if not for their race, religion, and/or national origin—I dismiss their equal protection claims.

Arg. Tr. 59-61, ECF No. 759. They allege that the MDC defendants then implemented that facially discriminatory policy by placing Muslim and Arab noncitizens in the ADMAX SHU because of their race, religion, and/or national origin, causing injury to plaintiffs. Accordingly, plaintiffs must plausibly allege that the DOJ defendants adopted and the MDC defendants implemented such a facially discriminatory policy, which injured the plaintiffs.

2. *The Sufficiency of the Allegations*

The Complaint alleges that Ashcroft, Mueller, and Ziglar created, and Hasty, Zenk, Sherman, Lopresti, and Cuciti implemented, the detention policy, which was expressly directed at Arab and Muslim men.[17] Although only the harsh confinement policy is challenged here, the Complaint alleges that each piece of the detention policy—including the initial arrest, "of interest" treatment, and application of the hold-until-cleared policy—overtly targeted Arab and Muslim individuals. Such allegations "can provide the framework of a complaint, [but] they must be supported by factual allegations." *Iqbal*, 556 U.S. at 679. And after careful review of the Complaint, taking due note of the Supreme Court's analysis in *Iqbal*,

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[17] See, *e.g.*, ¶7 ("Plaintiffs' and class members' race, religion, ethnicity, and national origin played a decisive role in Defendants' decision to detain them initially and to subject them to punitive and dangerous conditions of confinement . . . ."); ¶282 ("In subjecting Plaintiffs and class members to harsh treatment not accorded similarly situated non-citizens, Defendants . . . singled out Plaintiffs and class members based on their race, religion, and/or ethnic or national origin . . . ."); ¶48 ("Ashcroft, Mueller, and Ziglar's decision to hold [the Detainees] for criminal investigation without evidence of any ties to terrorism was based on their discriminatory notion that all Arabs and Muslims were likely to have been involved in the terrorist attacks, or at least to have relevant information about them.").

I conclude that the facts alleged adequately support the plaintiffs' claims against the MDC defendants, but not against the DOJ defendants.

a. *The DOJ Defendants*

The Complaint fails to allege facts sufficient to raise a reasonable inference that Ashcroft, Mueller and Ziglar created the alleged harsh confinement policy. To be sure, there are ample allegations that these defendants—particularly Ashcroft and Mueller—classified persons on the basis of race, religion and national origin for purposes of arrest and detention. See, *e.g.*, ¶¶40, 41, 43, 44. But those alleged actions do not constitute equal protection violations standing alone. For example, Ashcroft's direction to arrest all male immigration violators between the ages of 18 and 40 from a Middle Eastern country did not, in light of the executive branch's plenary power over immigration, amount to an equal protection violation. See *Turkmen I*, 2006 WL 1662663, at *41-43; *Turkmen II*, 589 F.3d at 550. I have considered whether the discriminatory animus suggested by that direction and the other allegations—regardless of whether they are actionable in themselves—may properly be relied on to suggest animus on the part of Ashcroft, Mueller, and Ziglar with respect to the sole equal protection violation alleged, *i.e.*, the facially discriminatory harsh confinement policy. But there is a critical distinction between a decision to round up violators of the immigration laws and a decision to treat them harshly once they are in federal custody. There is no "equal protection right to be free of selective enforcement of the immigration laws based on national origin, race or religion." *Turkmen II*, 589 F.3d at 542. Because of the broad powers of the political branches in the areas of immigration and naturalization, in that one setting discrimination on grounds of race, religion and

national origin is not invidious. See *Reno* v. *Arab-American Anti-Discrimination Comm.*, 525 U.S. 471, 490-91 (1999). There is indeed an equal protection right to be free of excessively harsh conditions of confinement on those bases, but I am reluctant to allow allegations of lawful conduct to support an inference that the DOJ Defendants created the facially discriminatory confinement policy alleged here.

Plaintiffs' allegations fall short of raising a reasonable inference that Ashcroft, Mueller, and Ziglar created the alleged overtly discriminatory harsh confinement policy. For example, the allegation that the head of the New York FBI field office thought that national origin and religion were relevant to the PENTTBOM investigation requires inference upon inference—that the office head thought these traits were relevant because of Ashcroft, Mueller, or Ziglar's orders and that discrimination with respect to the PENTTBOM investigation translated into discrimination with respect to conditions of confinement—and those inferences are very weakly suggested. Similarly, that Ashcroft, Mueller, and Ziglar were aware that Arab and Muslim noncitizens encountered during the PENTTBOM investigation were, without individualized assessment, automatically treated as "of interest" potentially raises an inference these defendants harbored discriminatory animus. However, because the same allegation is also consistent with a policy to treat everyone encountered during the PENTTBOM investigation as "of interest," this allegation standing alone would be insufficient to render the plaintiffs' equal protection claim plausible.

In making this determination, I acknowledge that the factual allegations before me now are distinguishable from those alleged in *Iqbal*, where the Supreme Court

determined that the plaintiffs failed to state a plausible claim. 556 U.S. at 683. In *Iqbal*, the plaintiffs alleged that Ashcroft and Mueller designated them as of high interest to the PENTBOMM investigation and held them in the ADMAX SHU because of discriminatory animus. *Id.* at 668-69. However, the only relevant factual allegations plaintiffs made at the time were (1) that Ashcroft and Mueller approved of holding "of high interest" detainees in harsh conditions of confinement until they were cleared of suspicion and (2) that thousands of Arab and Muslim individuals were held in harsh conditions of confinement. *Id.* at 681. The Court concluded that the former allegation plausibly suggested only that "the Nation's top law enforcement officers, in the aftermath of a devastating terrorist attack, sought to keep suspected terrorists in the most secure conditions available until the suspects could be cleared of terrorist activity." *Id.* at 683. And it found that the latter allegation, although consistent with discriminatory animus, was not suggestive of such animus because "[i]t should come as no surprise that a legitimate policy directing law enforcement to arrest and detain individuals because of their suspected link to the attacks would produce a disparate, incidental impact on Arab Muslims, even though the purpose of the policy was to target neither Arabs nor Muslims." *Id.* at 682.

Now, however, the plaintiffs have amplified their claim with more factual allegations. For example, the Complaint alleges that Ashcroft, Mueller, and Ziglar knew that law enforcement lacked any information tying the Detainees to terrorism, suggesting that the harsh confinement policy was not simply about keeping suspected terrorists in secure conditions. And plaintiffs allege that the few individuals initially detained in harsh conditions who were not Arab or Muslim were cleared quickly or

moved into the general population without clearance, demonstrating that at least some non-Arab and non-Muslim individuals were treated differently than the MDC Detainees. I find the issue to be a close one, but after applying the *Iqbal* pleading standard I conclude that these allegations, viewed together with all the allegations in the Complaint, do not plausibly suggest that the DOJ Defendants purposefully directed the detention of the plaintiffs in harsh conditions of confinement due to their race, religion or national origin.

b. *The MDC Defendants*

With respect to Hasty, Zenk, Sherman, Lopresti, and Cuciti, I conclude that the Complaint raises the reasonable inference that they effectuated the harsh confinement policy and held the Detainees in restrictive conditions of confinement because of their race, religion, and/or national origin. In so determining, I rely upon the allegations set forth above, as well as the allegations that:

- Hasty, Zenk, Sherman, Lopresti, and Cuciti created the harsh conditions at the ADMAX SHU and either personally witnessed or received complaints about how the MDC Detainees were treated there. ¶¶24-28.
- The Detainees were placed in the ADMAX SHU without hearings or individualized determinations of dangerousness. ¶¶68-74.
- Lopresti signed a document that was prepared by Cuciti, and approved by Hasty and Sherman, which untruthfully stated that the executive staff at MDC had classified the "suspected terrorists" as "High Security" based on an individualized assessment of their "precipitating offense, past terrorist behavior, and inability to adapt to incarceration." ¶74.

- Hasty, Sherman, and Lopresti continued to hold the MDC Detainees in the ADMAX SHU even after learning that the FBI had not developed any information to tie them to terrorism. ¶69.
- Staff verbally abused the MDC Detainees by, for example, referring to them as terrorists, insulting their religion, and referring to them as camels. ¶¶109-10. Hasty too referred to the Detainees as terrorists. ¶¶77, 109.
- Staff refused the MDC Detainees' requests to keep the Koran in their cells, to be provided with Halal food, to be told the time of day so they could pray at proper times, and to be told the date so that they could acknowledge Ramadan. ¶132-34. They also frequently interrupted the MDC Detainees' prayers by banging on cell doors, screaming derogatory anti-Muslim comments, videotaping them, and telling them to "shut the fuck up," among other things. ¶136.

In light of these factual allegations, and because there is no reasonable dispute that the MDC defendants' conduct caused plaintiffs' injuries, I conclude that the Complaint pleads a plausible equal protection claim against the MDC defendants.

3. *Qualified Immunity*

Qualified immunity is unavailable to any of the MDC defendants. It was clearly established in 2001 that creating and implementing a policy expressly singling out Arabs and Muslims for harsh conditions of confinement violates their Fifth Amendment equal protection rights. See *Iqbal*, 490 F.3d at 174 ("The Plaintiff also alleges that 'Defendants specifically targeted [him] for mistreatment because of [his] race, religion, and national origin.' These

allegations are sufficient to state a claim of animus-based discrimination that any 'reasonably competent officer' would understand to have been illegal under prior case law." (quoting *Malley* v. *Briggs*, 475 U.S. 335, 341 (1986)); *Hayden*, 180 F.3d at 48 (stating that racial classifications violate the Equal Protection Clause where motivated by racial animus and having a discriminatory effect). In addition, insofar as the MDC defendants seek qualified immunity on the theory that they were following facially valid orders, this gets them nowhere; the Complaint alleges that the harsh confinement policy was facially discriminatory, not facially valid. The defendants are not entitled to qualified immunity on plaintiffs' equal protection claim.

D. Claims Four and Five: Interference with Communications

The MDC plaintiffs allege that Ashcroft, Mueller, and Ziglar created an explicit policy to limit MDC Plaintiffs' and class members' access to the outside world and that the MDC Defendants implemented that policy in violation of the First Amendment and Fifth Amendment substantive due process rights ("communications claims").[18] ¶¶288-96; Pls.' Mem. Opp. Mot. to Dismiss 69, ECF No. 749. These communications restrictions are alleged to have taken multiple forms: (1) an express policy to hold them incommunicado until mid-October 2001 despite the

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[18] The Complaint also appears to raise a due process claim for defendants' alleged interference with their right to access the courts. ¶294. As plaintiffs' counsel conceded at oral argument, see Oral Arg. Tr. at 56, I dismissed that claim in *Turkmen I*, 2006 WL 1662663, at *48-49, and I see no reason to revisit that decision. To the extent plaintiffs press a claim with respect to their right of access to the courts, it is dismissed.

lack of any basis to believe they had any link to terrorism; (2) the MDC guards effectively denied them one-legal call per week and one social visit per month after the complete communications blackout was lifted; and (3) the MDC defendants permitted the video and audiotaping of the detainees' visits with their attorneys, including the use of sound recording.

1. *Qualified Immunity*

When qualified immunity is raised in a motion to dismiss, court must determine (1) whether the alleged facts demonstrate that a defendant violated a constitutional right; and, if yes, (2) whether this constitutional right was clearly established at the time of the challenged action. *Saucier*, 533 U.S. at 201. As discussed above, following the Supreme Court's decision in *Pearson* v. *Callahan*, 555 U.S. 223 (2009), courts have discretion to elect which prong of the qualified immunity inquiry to consider first. See *Pearson*, 555 U.S. at 236 ("The judges of the district courts . . . should be permitted to exercise their sound discretion in deciding which of the two prongs of the qualified immunity analysis should be addressed first in light of the circumstances in the particular case at hand."). When a court grants immunity at step two of the qualified-immunity analysis, it is within its discretion to decline to address the constitutionality of the defendants' conduct. *Pearson* identified a number of factors that might influence a court to exercise its discretion not to reach the constitutional question: (1) the constitutional violation question "is so factbound that the decision provides little guidance for future cases"; (2) "it appears that the question will soon be decided by a higher court"; (3) deciding the constitutional question requires "an uncertain interpretation of state law"; (4) "qualified immunity is asserted at the

pleading stage" and "the precise factual basis for the . . . claim . . . may be hard to identify"; (5) tackling the first element "may create a risk of bad decisionmaking" due to inadequate briefing; (6) discussing both elements risks "bad decisionmaking" because the court is firmly convinced the law is not clearly established and is thus inclined to give little thought to the existence of the constitutional right; or (7) the doctrine of "constitutional avoidance" suggests the wisdom of passing on the first constitutional question because "it is plain that a constitutional right is not clearly established but far from obvious whether in fact there is such a right." 555 U.S. at 236-42.

a. *The Initial Communications Blackout*

The inquiry into whether a particular right is clearly established for purposes of qualified immunity looks to "whether it would have been clear to a reasonable officer that his conduct was unlawful in the situation he confronted," *Saucier*, 533 U.S. at 202. This is a context-specific inquiry. The question, therefore, is whether an officer could believe it was objectively reasonable—in light of the specific context—to impose a complete communications ban where, as here, the officers have no basis to form any individualized suspicion that any detainee has any connection to terrorism.

No court has considered whether—in exigent circumstances analogous to those present here—access to telephones or to outside persons can be curtailed for persons detained for civil immigration violations. As plaintiffs' counsel conceded during oral argument, in the abstract it is (and was in 2001) hard to draw the line between communications restrictions that are constitutional and those that are not. See Oral Arg. Tr. at 49-52. For example, counsel agreed that it may be permissible to impose an

"emergency lockdown . . . for a day," but argued that it is clearly established that such a lockdown is unconstitutional when imposed for a longer period. Oral Arg. Tr. at 51. I disagree. Even assuming a lengthier blackout crossed the threshold from permissible to impermissible conduct, I cannot agree that this was so clearly established that qualified immunity is unavailable.[19]

In reaching this conclusion, I take guidance from the Second Circuit's decision in *Iqbal*, 490 F.3d at 143, regarding the significance of the post-9/11 context. Specifically, the court stated that most of the rights asserted here "do not vary with the surrounding circumstances." *Id.* at 159. That category of rights, the court observed, includes "the right not to be subjected to needlessly harsh conditions of confinement, the right to be free from the use of excessive force, and the right not to be subjected to ethnic or religious discrimination." *Id.* On the other hand, "the gravity of the situation" in the aftermath of the attacks caused the Second Circuit to "recognize that some forms of governmental action are permitted in emergency situations that would exceed constitutional limits in normal times." *Id.* The court suggested as an example the Fourth Amendment right to be free from unreasonable searches. Whereas a detainee's "right not to be needlessly harassed and mistreated in the confines of a prison cell by repeated strip and body-cavity searches" and "the right to be free from excessive force and not to be subjected to ethnic or religious discrimination" are not diminished by exigent circumstances, the court ob-

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[19] I acknowledge that I saw this issue differently in *Turkmen I*, 2006 WL 1662663, at *26; however, taking cues both from the Second Circuit's decision in *Iqbal*, 490 F.3d at 159, and the briefing and oral argument on this motion, I have revisited these earlier conclusions.

served that those circumstances might justify an otherwise impermissible warrantless entry into a home. *Id.* at 159-60.

In addition to its potential effect on the *lawfulness* of government conduct, the Second Circuit held that the post-9/11 context has an important bearing on whether law enforcement officers might be justified in *believing*, however incorrectly, that their actions were lawful. *Id.* at 160. Specifically, in reversing on qualified immunity grounds my decision upholding plaintiffs' procedural due process claim, the court referred to the national security concerns at the time in determining that the procedural due process right was not firmly established:

> [U]ncertainty in existing case law is heightened by the fact that, even on the facts alleged in the complaint, which specified that the "of high interest" designation pertained to the Government's post-9/11 terrorism investigation, the investigation leading to the Plaintiff's separation from the general prison population could be reasonably understood by all of the Defendants to relate to matters of national security, rather than an ordinary criminal investigation. Prior to the instant case, neither the Supreme Court nor our Court had considered whether the Due Process Clause requires officials to provide ordinary administrative segregation hearings to persons detained under special conditions of confinement until cleared of connection with activities threatening national security. Cf. [*Mitchell* v.] *Forsyth*, 472 U.S. [511] at 534-35 [(1985)] (granting Attorney General qualified immunity for warrantless wiretapping for national security purposes despite prohibitions of warrantless wiretapping in criminal context).

Id. at 167.

Assuming *arguendo* that plaintiffs had a right to make phone calls and to be in contact with persons outside the detention facility, and that the right was violated, I conclude that officers of reasonable competence could nonetheless have disagreed about whether their conduct violated that right in light of national security concerns in the aftermath of the 9/11 attacks. Considering the context and the lack of clear case law from the Supreme Court and the Second Circuit, reasonable officers could believe that such a policy—though crude and overbroad—was permissible. Accordingly, I find qualified immunity on these claims for all Defendants.[20]

b. *The Interference with Access to Families and Friends*

It was not clearly established in September of 2001 that social calls and visits could not be carefully restricted, as a matter of policy, for inmates and detainees in administrative segregation. See *Overton* v. *Bazzetta*, 539 U.S. 126, 133 (2003) (Michigan's severely restrictive visitation program did not violate the Constitution because it constituted "a proper and even necessary management technique to ensure compliance with the rules of inmate

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[20] I do not reach the merits of whether Plaintiffs' allegations of an express policy to hold the plaintiffs incommunicado states a claim under the First and Fifth Amendments. As discussed above, I am not required to. Moreover, I am mindful of the Supreme Court's admonition in *Camreta* v. *Greene*, 131 S. Ct. 2020 (2011), that lower courts should "think hard, and then think hard again" before unnecessarily deciding the merits of a constitutional issue. *Id.* at 2032. In light of the lack of guidance from the Second Circuit and the Supreme Court on constitutional restrictions on communication rights of pretrial detainees, I conclude that it is appropriate to decline to reach the constitutional question.

behavior, especially for high-security prisoners who have few other privileges to lose.").[21] This conclusion is not changed even assuming, as I must, that the restrictions were imposed here without any individualized assessment of the need for them or suspicion of any connection to terrorism. Even if it were clearly established that the measures alleged here could not be taken lawfully in the absence of individualized intelligence linking each detainee to a security threat, reasonable officers could have concluded otherwise.

The frequency of attorney visits is governed by a regulation stating that "The Warden *generally* may not limit the frequency of attorney visits." 28 C.F.R. § 543.13(b) (emphasis added). The regulation permits the warden to "set the time and place for visits" and to "make exceptions according to local conditions or for an emergency situation demonstrated by the inmate or visiting attorney." I owe substantial deference to the institution's interpretation of the regulation. See *Bell*, 441 U.S. at 547 ("Prison administrators therefore should be accorded wide-ranging deference in the adoption and execution of policies and practices that in their judgment are needed

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[21] Several district courts in the Second Circuit have since held that various types of restrictions on inmate social contacts do not violate the Constitution. See, *e.g.*, *Griffin* v. *Clearce*, 2005 WL 1200532, at *6 (D. Conn. 2005) (inmate had "no constitutional right to telephone use, social visits and commissary privileges"); *Allah* v. *Poole*, 506 F. Supp. 2d 174, 184-85 (W.D.N.Y. 2007) (not clearly established that a prison could not forbid inmates from speaking languages other than English); *Zimmerman* v. *Burge*, 2008 WL 850677, at *3 (N.D.N.Y. March 28, 2008) (denial of contact visits for drug-addicted inmate for indefinite period of time exceeding two and one-half years bore rational relationship to legitimate penological interests and therefore did not violate Eighth Amendment).

to preserve internal discipline and to maintain institutional security."). In light of these considerations, and given the breadth of the discretion conferred by the regulation and the lack of case law interpreting the term "generally," I conclude that the alleged limitations on the frequency of attorney visits and phone calls did not violate clearly established law. See *Schick* v. *Apker*, 2009 WL 2016933, at *9 (S.D.N.Y. March 5, 2009) (collecting pre-2001 cases); *Smith* v. *O'Connor*, 901 F. Supp. 644, 648 (S.D.N.Y. 1995) (while inmate has constitutional right of access to counsel, this access need not be more than "reasonable"); *Bellamy* v. *McMickens*, 692 F. Supp. 205, 214 (S.D.N.Y. 1988) (no constitutional violation where plaintiff "does not allege that he was denied absolute access to his counsel by the restrictions on his phone calls, but rather that he was delayed in communicating with his attorney") (citing *Lock* v. *Jenkins*, 464 F. Supp. 541, 551 (N.D. Ind. 1978) (provision of weekly calls with counsel was sufficient to satisfy Constitution)).

Even though "[a] prison inmate's rights to communicate with family and friends are essentially First Amendment rights," *Morgan* v. *LaVallee*, 526 F.2d 221, 225 (2d Cir. 1975), the uncertain contours of those rights, taken together with the national security concerns that permeated the context, sufficed to raise a legitimate question among government officials as to whether the First Amendment required the prison officials to afford the Detainees greater access to legal and social calls. *Iqbal*, 490 F.3d at 167-68. Accordingly, I find that there is qualified immunity for all Defendants for these claims.

c. *Video-taping attorney visits*

The most troubling strand of the interference-with-communications claim is the plaintiffs' allegation that the guards overheard or recorded attorney-client telephone

calls and meetings. With some reluctance, I nonetheless conclude that it was insufficiently clear that civil immigration detainees' discussions with their attorneys may not be subject such monitoring under any circumstances, and that qualified immunity is therefore available. Plaintiffs point to no case law from the Second Circuit or the Supreme Court—nor can I find any—that renders it clear that such a policy violates federal constitutional rights. In so holding, I am mindful that there is no need for precedents exactly on point in order for a right to be clearly established. See *Hope* v. *Pelzer*, 536 U.S. 730, 739 (2002) (holding that a constitutional right is clearly established, if "its contours [are] sufficiently clear that a reasonable official would understand that what he is doing violates that right."). Rather, it is sufficient if, in light of the pre-existing law, "the unlawfulness [is] apparent." *Id.* (internal citations and quotation marks omitted); see also *Ashcroft* v. *al-Kidd*, 131 S. Ct. 2074, 2083 (2011) ("We do not require a case directly on point . . .").

Plaintiffs point out that the recording of inmates' meetings with attorneys is prohibited by 28 C.F.R. §543.13(e), but "[o]fficials sued for constitutional violations do not lose their qualified immunity merely because their conduct violates some statutory or administrative provision." *Davis* v. *Scherer*, 468 U.S. 183, 194 (1984). The claim for damages here asserts a violation of the First and Fifth Amendments, not §543.13(e), and it was not clearly established that video and auditory recordings of attorney visits with civil immigration detainees offends the Constitution. But see *Lonegan* v. *Hasty*, 436 F. Supp. 2d 419, 422 (E.D.N.Y. 2006) (denying qualified immunity because the regulation at issue "was in effect during the time period at issue and remains in effect at present," rendering the prohibition clearly established); *Ma-*

lik v. *Hershberger*, 1995 WL 135558, at *7 (S.D.N.Y. March 29, 1995) (clearly established that guards could not "aural[ly] monitor ... an attorney-client conversation"). Here again, I conclude that the context of the alleged claims has a legitimate impact on the range of conduct that prison officials could reasonably have believed was justified in the interests of national security. *Iqbal*, 490 F.3d at 167.[22]

F. [*sic*] Claim Three: Interference with Religious Practice

The plaintiffs[23] allege that the DOJ defendants' creation and the MDC defendants' implementation of the harsh confinement policy violated their free exercise rights under the First Amendment. Specifically, they contend that the defendants intentionally burdened the exercise of their religion by (1) subjecting them to verbal and physical abuse; (2) denying them Halal food; (3) refusing to let them keep a Koran in their cells; and (4) interfering with their daily prayer requirements. They assert this claim against all defendants.

1. *The Availability of a* Bivens *Remedy*

In *Iqbal*, the Supreme Court assumed without deciding that a *Bivens* claim is available to remedy a deprivation of a prisoner's free exercise rights, but the Court's opinion suggested skepticism on the issue.[24] Defendants

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[22] Because I find that qualified immunity is available, I need not decide whether a *Bivens* remedy is available for these communications-based claims.

[23] Sachdeva and Bajracharya do not assert this claim at all, and Turkmen asserts this claim only against the DOJ defendants.

[24] The Court wrote as follows on the subject:

> Because implied causes of action are disfavored, the Court has been reluctant to extend *Bivens* liability "to any new context

contend that a damages remedy under *Bivens* is not available, and thus I must first decide whether to extend *Bivens* to this new context.

Bivens held that the Fourth Amendment implied a damage remedy against an officer who violated it. *Bivens*, 403 U.S. at 389. The remedy was extended by *Davis* v. *Passman*, 442 U.S. 228 (1979) to a former congressional employee's claim under the equal protection component of the Fifth Amendment Due Process Clause based on her employer's sex discrimination, and again by *Carlson* v. *Green*, 446 U.S. 14 (1988), to a federal prisoner's Eighth Amendment claim based on deliberate indifference to his medical needs. But in the 24 years "[s]ince *Carlson*, the Court has had to decide in several different instances whether to imply a *Bivens* action. And in each instance it has decided against the existence of such an action." *Minneci* v. *Pollard*, 132 S. Ct. 617, 622 (2012). Moreover, two members of the Court have repeatedly described *Bivens* as "a relic of the heady days in which this Court assumed commonlaw powers to create causes

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or new category of defendants." That reluctance might well have disposed of respondent's First Amendment claim of religious discrimination. For while we have allowed a *Bivens* action to redress a violation of the equal protection component of the Due Process Clause of the Fifth Amendment, we have not found an implied damages remedy under the Free Exercise Clause. Indeed, we have declined to extend *Bivens* to a claim sounding in the First Amendment. *Bush* v. *Lucas*, 462 U.S. 367, 103 S.Ct. 2404, 76 L.Ed.2d 648 (1983). Petitioners do not press this argument, however, so we assume, without deciding, that respondent's First Amendment claim is actionable under *Bivens*.

Iqbal, 556 U.S. at 675 (some citations and internal quotation marks omitted).

of action by constitutional implication," which they would end by limiting the *Bivens* damages remedy "to the precise circumstances" of the three cases in which it was implied. *Id.* at 626 (quoting *Corr. Servs. Corp.* v. *Malesko*, 534 U.S. 61, 75 (2001) (Scalia, J., concurring) (internal quotation marks omitted). Nevertheless, for the reasons discussed below, I hold that *Bivens* should be extended to afford the plaintiffs a damages remedy if they prove the alleged violation of their free exercise rights.

For new contexts in which a *Bivens* remedy has not yet been recognized, deciding the question involves a two-part inquiry: (1) is there an alternative remedial scheme available to the plaintiffs?; and (2) are there "special factors" that "counsel hesitation" in creating the remedy? *Arar* v. *Ashcroft*, 585 F.3d 559, 563 (2d Cir. 2009) (en banc). I answer both questions in the negative.

There is no remedy for the violation of plaintiffs' free exercise rights in the absence of a *Bivens* claim. The defendants do not contend otherwise. To the contrary, they argue that Congress deliberately chose not to create one. Specifically, they contend that the Immigration and Nationality Act (the "INA") is a comprehensive remedial scheme for the "interest at issue," Ashcroft's Mem. of Law Support Mot. to Dismiss 6, ECF No. 736, presumably referring, at least in part, to the interest in not being subjected to deliberate interference with respect to religious practices. Defendants then admit that the INA affords no remedy for the deprivation of that interest. This decision not to provide plaintiffs with a monetary remedy, the argument concludes, means Congress wanted the judiciary to refrain from extending the *Bivens* remedy into this setting.

This argument, which parallels the Second Circuit's reasoning in *Arar*, does not work in this setting. Arar

had been ordered removed by the INS, and the Deputy Attorney General determined that his removal to Syria, where he was tortured, was consistent with the Convention Against Torture. *Arar*, 585 F.3d at 586. The Second Circuit observed that the provision by Congress of a comprehensive and intricate statutory scheme for review of orders of removal, including review of the government's designation of a particular destination country, would ordinarily[25] warrant the conclusion that another remedy for the wrongful delivery of Arar to the Syrians, *i.e.*, a *Bivens* damage remedy, is unwarranted. *Id.* at 572-73.

The plaintiffs in this case do not complain about their deportations. They are complaining about their treatment before they were deported. "Although . . . the INA provides a comprehensive *regulatory* scheme for managing the flow of immigrants in and out of the country, it is by no means a comprehensive *remedial* scheme for constitutional violations that occur incident to the administration of that regulatory scheme." *Turkmen I*, 2006 WL 1662663, at *29 (emphases in original).

Most importantly, the plaintiffs are not complaining simply about facially neutral BOP policies that substantially burden their free exercise of religion. If they were, I might conclude that their "full access to remedial mechanisms established by the BOP, including suits in federal court for injunctive relief . . . and grievances filed through BOP's Administrative Remedy Program,"

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[25] Since the government actively prevented Arar from availing himself of that statutory scheme, the Second Circuit did not rest its decision on this ground. Rather, proceeding to the second step of the analysis, it concluded that there were special factors counseling hesitation before extending the *Bivens* remedy. *Arar*, 585 F.3d at 573.

Malesko, 534 U.S. at 62, provides sufficiently meaningful redress to preclude the implication of a *Bivens* damages remedy. But the plaintiffs allege a series of acts that were directed only at them (and the class of detainees they seek to represent) with the specific intent to deny them the right to practice their religion. They have sued the individuals who they allege engaged in those acts, and there is no scheme—statutory or regulatory, comprehensive or otherwise—for a person detained in a federal facility to seek *any* remedy from an officer for intentionally and maliciously interfering with his right to practice his religion. The precise purpose of the *Bivens* damages remedy is to deter individual officers from engaging in such unconstitutional conduct. *FDIC* v. *Meyer*, 510 U.S. 471, 485 (1994). In short, for these plaintiffs, as for Bivens himself and the plaintiff in *Passman*, "'it is damages or nothing.'" *Passman*, 442 U.S. at 245 (quoting *Bivens*, 403 U.S. at 410 (Harlan, *J.*, concurring in judgment)).[26]

The second inquiry in determining whether a *Bivens* claim should be implied is whether special factors counsel

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[26] Because *Bush* v. *Lucas* may be the source of the Supreme Court's apparent hesitation regarding the availability of a *Bivens* remedy to a First Amendment claim, see *Iqbal*, 556 U.S., at 675 (citing *Lucas*, 462 U.S. 36 (1983)), I have examined the case carefully, but I remain confident that the remedy is available here. *Lucas* involved an aerospace engineer's effort to seek a *Bivens* remedy for a free speech claim even though he had already obtained a remedy under a federal workplace protection statute. The key to the Court's refusal to find an implied damages remedy under the Free Exercise Clause was the fact that Congress had already provided "comprehensive procedural and substantive provisions giving meaningful remedies against the United States." *Lucas*, 462 U.S. at 368. There are no analogous alternative remedies available to the plaintiffs here.

hesitation before doing so. *Arar* makes abundantly clear that "'[s]pecial factors' is an embracing category," and that it takes very little for a particular factor to counsel sufficient hesitation to preclude the *Bivens* remedy. *Arar*, 585 F.3d at 573-74 ("Hesitation is a pause, not a full stop, . . . and to counsel is not to require."). As a result, federal officials seeking to fend off extensions of the *Bivens* remedy into other contexts face a "remarkably low" threshold. *Id.* at 574. Yet I conclude the officers here have failed to cross it.

Among the special factors that have counseled sufficient hesitation to foreclose the extension of *Bivens* are "military concerns; separation of powers; the comprehensiveness of available statutory schemes; national security concerns; and foreign policy considerations." *Id.* at 573 (citations omitted). The defendants here contend that the national security concerns implicated by the September 11 attacks and their aftermath counsel hesitation in implying a *Bivens* remedy for the violation of the detainees' right to free exercise of religion, and thus preclude me from doing so.

Though the argument has some merit, it does not cover as much ground as the defendants want it to. As discussed above, the Second Circuit recognized in *Iqbal* that national emergencies like the September 11 attacks not only furnish the occasion for the full exercise of government power, but may enlarge that power as well. 490 F.3d at 159-60. Thus, though the government ordinarily detains and commences removal proceedings in furtherance of immigration policies, I previously held in this case that its use of that authority in furtherance of an ulterior motive to hold the detainees until they were cleared of suspicions of terrorism was a lawful (even if rarely used) exercise of its existing power. *Turkmen I*, 2006 WL

1662663, at *1. And that existing power can be enlarged by a national security emergency; for example, as Judge Newman observed in *Iqbal*, the exigent circumstances created by such an emergency "might justify governmental action that would not otherwise be permitted" under the Fourth Amendment. *Iqbal*, 490 F.3d at 159.

But context matters, and the right of a person detained in an American prison not to be subjected to malicious mistreatment by federal officers that is specifically intended to deprive him of his right to free exercise of his religion was not diminished by the September 11 attacks. *Id.* at 159-60. Moreover, the defendants have not even attempted to explain why the availability of a damages remedy if the plaintiffs prove their claim would adversely impact our national security even in the slightest. Intuition suggests the opposite: if an American jury finds that federal officers deprived detainees of the Koran and Halal food, refused to tell them the correct time of day, and banged on their cell doors while screaming profanities and anti-Muslim epithets, all for the specific purpose of interfering with their exercise of their Muslim faith, one would think our national security interests would only be enhanced if the world knew that those officers were held liable for the damages they caused.

In sum, the Supreme Court's treatment of this issue in *Iqbal* indeed suggests the "unsettling possibility" that individuals have no right "to pursue a damages claim for intentional, religiously-based mistreatment at the hands of the federal government." James F. Pfander, Iqbal, Bivens, *and the Role of Judge-Made Law in Constitutional Litigation*, 114 Penn St. L. Rev. 1387, 1400 (2010). However, because both of the prerequisites for an extension of *Bivens* have been met, I reject that outcome here and hold that the remedy is available.

2. *The Elements of the Claim*

Plaintiffs allege that the defendants created and implemented the harsh confinement policy with the express intention of burdening their right to practice their religion. Accordingly, they must plead that defendants, with the (1) intent to suppress their religious practices, (2) burdened those practices.[27] See *Church of the Lukumi Babalu Aye, Inc.* v. *City of Hialeah*, 508 U.S. 520 (1993). However, if such a burden advances interests of the highest order and is narrowly tailored in pursuit of those interests, no claim will lie. *Id.* at 546.

3. *The Sufficiency of the Allegations*

a. *The DOJ Defendants*

As with their equal protection claim, plaintiffs' free exercise claim against the DOJ defendants is premised upon the DOJ defendants' creation of a facially constitutional policy that was implemented unconstitutionally. Specifically, plaintiffs appear to contend that the DOJ defendants created the harsh confinement policy with the intent to suppress the Detainees' religious practices and that this policy, when implemented by the MDC defendants, did ultimately cause such a burdening of the exercise of their religion.[28]

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[27] When a *neutral* prison policy impinges on inmates' fundamental constitutional rights, the policy is valid if it is "reasonably related to legitimate penological interests." *Turner* v. *Safley*, 482 U.S. 78, 89 (1987); accord *O'Lone* v. *Estate of Shabazz*, 482 U.S. 342, 349 (1987); *Benjamin* v. *Coughlin*, 905 F.2d 571, 574 (1990). However, because *intentional* burdening of religious practices is involved here, the *Turner* v. *Safley* standard does not apply.

[28] It may be possible to state a free exercise claim against government officials who cause a burden on a plaintiff's free exercise of his religion not with the specific intent to burden that exercise but with

The Complaint fails to plausibly plead that the DOJ defendants intended to burden the plaintiffs' free exercise of their religion. As with plaintiffs' substantive due process claim, this claim appears to rest on an argument that, because their policy was implemented unconstitutionally, they must have intended that result. Thus, for the same reasons set forth in my discussion of the substantive due process claim, I conclude that the DOJ defendants' failure to specify that their policy be implemented lawfully does not raise the reasonable inference that they intended for the policy to be implemented unlawfully. Accordingly, I dismiss the free exercise claim against the DOJ defendants.

b. *The MDC Defendants*

The MDC defendants are alleged to have implemented policies (*e.g.*, forbidding the MDC Detainees from keeping any items, including the Koran, in their cells) that burdened the exercise of their religion. They are also alleged to have failed to stop MDC guards from engaging in abusive conduct unsanctioned by express policy (*e.g.*, verbal and physical abuse) that further burdened the Detainees' religious practices. The Complaint contends that the MDC defendants engaged in such conduct with the intent to suppress the MDC Detainees' religious practices.

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the more general intent to subject people of a particular religion to an adverse action on the basis of that religion. See *Iqbal*, 556 U.S. at 676 (assuming that intentional discrimination with respect to placement in the ADMAX SHU burdens free exercise rights) (citing *Lukumi*, 508 U.S. at 540-41); cf. *McDaniel* v. *Paty*, 435 U.S. 628 (1978). This kind of more general religious discrimination claim does not appear to be advanced by the plaintiffs in this case, and I thus do not consider whether the Complaint might adequately plead such a claim.

With respect to the abusive conduct unsanctioned by express policy, the plaintiffs have adequately pleaded that the MDC defendants were deliberately indifferent to the known risk that their subordinates, MDC prison guards, would violate the Detainees' free exercise rights. Indeed, as with the First and Fifth Amendment claims discussed above, the Complaint adequately alleges that the MDC defendants were aware of the abusive conduct of the MDC guards. See ¶¶24-28. None of the MDC defendants contest—and it cannot be reasonably contested—that this policy of inaction satisfies the strict scrutiny required under *Lukumi*. See 508 U.S. at 546. And defendants' inaction in the face of such outrageous abuse suffices, at this stage, to render plausible plaintiffs' allegation that the MDC defendants intended to suppress their religious practices and that the MDC defendants' misconduct caused the plaintiffs' injuries. With respect to the burdens imposed as a matter of express policy, no question exists that defendants' actions caused the injuries alleged and, as already established, the Complaint adequately pleads intent. Finally, while it is possible that these challenged restrictions may in fact be narrowly tailored to a sufficiently important interest, this is not obvious on the face of the Complaint and defendants must await discovery to so prove. See *Iqbal*, 490 F.3d at 173-74.

4. *Qualified Immunity*

I reject the MDC defendants' argument that they are entitled to qualified immunity. The plaintiffs' right to a reasonable opportunity to worship has long been clearly established. See, *e.g.*, *Cruz* v. *Beto*, 405 U.S. 319, 322 (1972) ("If Cruz was a Buddhist and if he was denied a reasonable opportunity of pursuing his faith comparable to the opportunity afforded fellow prisoners who adhere

to conventional religious precepts, then there was palpable discrimination by the States against the Buddhist religion"); see also *Salahuddin* v. *Coughlin*, 993 F.2d 306, 308 (2d Cir. 1993) (holding that it is "well established that prisoners have a constitutional right to participate in congregate religious services."). And if the well-pleaded allegations of intentional interference with the plaintiffs' religious practices are proven, no officer could reasonably believe that the conduct at issue was lawful. Accordingly, I conclude, as did the Second Circuit in *Iqbal*, that the plaintiffs' allegations in claim three "suffice to preclude a qualified immunity defense at this stage of the litigation." 490 F.3d at 173.[29]

E. [*sic*] Claim Six: Unreasonable Strip Searches (Fourth Amendment)[30]

The MDC plaintiffs also bring Fourth Amendment claims against the MDC defendants for subjecting them to unreasonable strip searches.[31] ¶¶297-302. They allege that they were strip-searched repeatedly and unnecessarily, in a humiliating and unreasonable manner.

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[29] It bears emphasis that the qualified immunity defense to this claim and the others as well may need to be revisited as the case progresses. I assume, as I must at this stage, the truth of the plaintiffs' factual allegations. At later stages, more will be required of the plaintiffs, and if only some of their allegations are properly supported by admissible evidence, the qualified immunity defense may be available. See, *e.g.*, *Coley* v. *Smith*, 441 F. App'x. 627, 629 (11th Cir. 2011) (failure to provide Muslim inmate with exact food he requested for Eid-ul-Fitr feast on correct day did not violate clearly established law).

[30] Plaintiffs also allege in Claim Six that the strip searches violated their right to substantive due process. That aspect of the claim is discussed above in tandem with Claim One.

[31] Only Benatta and Hamouda assert this claim again Zenk.

1. *Elements of the Claim*

In order to state a claim that the MDC defendants subjected them to unreasonable strip searches in violation of the Fourth Amendment, the plaintiffs must plead that the MDC defendants (1) caused them to be strip searched and (2) that the strip searches were not reasonably related to legitimate penological interests. See *Covino* v. *Patrissi*, 967 F.2d 73, 78 (2d Cir. 1992); *Iqbal*, 490 F.3d at 172. A search conducted in an unreasonable manner is not reasonably related to legitimate penological interests. See *Schmerber* v. *California*, 384 U.S. 757, 768 (1966).

2. *Sufficiency of the Allegations*

The Complaint alleges that the searches were conducted to punish and humiliate, without any penological justification. The MDC plaintiffs allege that they were strip searched every time they were removed from or returned to their cells, including after non-contact legal and social visits, and were subject to random strip searches even while in their cells. They also allege that they were, for example, strip searched multiple times in a row—even though they had no opportunity to acquire anything between the strip searches—and verbally abused and videotaped during the strip searches. The Complaint alleges that these searches were conducted pursuant to a facially unconstitutional policy created and implemented by the MDC defendants.

The Complaint states an unreasonable search claim against all of the MDC defendants. The defendants are alleged to have created a policy that, by its terms, mandated searches that were untethered to any legitimate penological purpose, see *Hodges* v. *Stanley*, 712 F.2d 34, 35 (2d Cir. 1983) (holding that consecutive body cavity searches of inmates are unreasonable); *Covino*, 967 F.2d

at 80 (searches used to harass and punish inmate are unreasonable); *Bono* v. *Saxbe*, 620 F.2d 609, 617 (7th Cir. 1980) (strip searches of inmates after non-contact visits are unreasonable unless there is some risk that contraband will be smuggled into prison), and performed in a humiliating manner, cf. *Schmerber*, 384 U.S. at 768. According to the Complaint, Hasty and Zenk ordered the creation of an unreasonable and punitive strip search policy, and Cuciti, with the help of Sherman and Lopresti, developed the specific policy. The MDC defendants do not challenge the plausibility of these allegations, and they clearly suffice to plead that each of the MDC defendants' own actions caused the unreasonable strip searches alleged.

3. *Qualified Immunity*

The allegations against the MDC defendants state a violation of clearly established Fourth Amendment law. It was clearly established at the time that a strip search policy designed to punish and humiliate was not reasonably related to a legitimate penological purpose and thus violated the Fourth Amendment, and no reasonable officer could have believed that the policy alleged was constitutional. See *Iqbal*, 490 F.3d at 173 ("It was clearly established that . . . strip and body-cavity searches be rationally related to legitimate government purposes."); *Hodges*, 712 F.2d at 35.

F. [*sic*] Claim Seven: Conspiracy to Violate Civil Rights

Plaintiffs' final claim is brought under 42 U.S.C. § 1985(3), which prohibits conspiracy "for the purpose of depriving . . . any person or class of person of the equal protection of the laws," and provides a private cause of action against the alleged conspirators. The plaintiffs allege that the DOJ defendants and, separately, the

MDC defendants conspired together to hold them in the harsh conditions of confinement discussed herein in violation of their equal protection rights.[32]

1. *Elements of the Claim*

To make out a claim under Section 1985, plaintiffs must plead and prove four elements: "(1) a conspiracy; (2) for the purpose of depriving, either directly or indirectly, any person or class of persons of equal protection of the laws, or of equal privileges and immunities under the laws; (3) an act in furtherance of the conspiracy; (4) whereby a person is either injured in his person or property or deprived of any right of a citizen of the United States." *Mian* v. *Donaldson, Lufkin & Jenrette Sec. Corp.*, 7 F.3d 1085, 1087 (2d Cir. 1993). The conspiracy must be motivated by some class-based animus. *Iqbal*, 490 F.3d at 176 (citing *Griffin* v. *Breckenridge*, 403 U.S. 88, 102 (1971)).

2. *Sufficiency of the Allegations*

For the reasons set forth above, the plaintiffs plausibly plead that Hasty, Zenk, Sherman, Lopresti, and Cuciti implemented the facially discriminatory harsh confinement policy and the interference with their free exer-

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[32] The defendants challenge whether this statute is applicable to them as federal officials in their individual capacities. The Second Circuit has held that, although it was not clearly established in 2001 that Section 1985 prohibited conspiracies among federal officials, "federal officials could not reasonably have believed that it was legally permissible for them to conspire with other federal officials to deprive a person of equal protection of the laws" where the officials' behavior "would violate the equal protection clause." *Iqbal*, 490 F.3d at 176. The defendants were thus on notice in 2001 that an allegation of conspiracy could arise from their alleged treatment of the plaintiffs.

cise of their religion, all as alleged in Claims One, Two, Three, and Six. The same allegations state a claim for a conspiracy motivated by class based animus and, accordingly, I conclude plaintiffs' §1985(3) claim is plausibly pleaded as against these MDC Defendants only. See *Iqbal*, 490 F.3d at 177.

3. *Qualified Immunity*

Defendants also suggest that they are entitled to qualified immunity because in 2001 it was not clearly established that Section 1985 applied to federal officials. As the Second Circuit has already explained, however, although it may not have been clearly established in 2001 that §1985 prohibited conspiracies among federal officials, "federal officials could not reasonably have believed that it was legally permissible for them to conspire with other federal officials to deprive a person of equal protection of the laws." *Id.* at 176. "[T]he proper inquiry is whether the *right* itself—rather than its *source*—is clearly established." *Russo* v. *City of Bridgeport*, 479 F.3d 196, 212 (2d Cir. 2007) (emphases in original). Accordingly, qualified immunity is inappropriate.

CONCLUSION

For the reasons set forth above, defendants' motions to dismiss are denied in part and granted in part. The motions filed by the DOJ defendants are granted in their entirety. The motions filed by the MDC defendants are granted in part and denied in part. Specifically, they are denied with respect to the claims based on the alleged harsh conditions of confinement and unlawful strip searches (Claims One, Two and Six) and the free exercise claim (Claim Three). They are granted with respect to the claims based on the alleged communications blackout and interference with counsel (Claims Four and Five). Finally, the motion to dismiss the conspiracy claim

(Claim Seven) is denied to the extent that the underlying objects of the conspiracy in Claims One through Six have survived the motion and granted to the extent they have not.

Counsel for the remaining parties are directed to appear before Chief Magistrate Gold for a status conference on January 30, 2013 at 2:00 PM.

So ordered.

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John Gleeson, U.S.D.J.

Dated: January 15, 2013
Brooklyn, New York

APPENDIX C
UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

No. 13-981-L

IBRAHIM TURKMEN, AKHIL SACHDEVA, AHMER IQBAL ABBASI, ANSER MEHMOOD, BENAMAR BENATTA, AHMED KHALIFA, SAEED HAMMOUDA, PURNA BAJRACHARYA, ON BEHALF OF THEMSELVES AND ALL OTHERS SIMILARLY SITUATED,

Plaintiffs-Appellees-Cross-Appellants,

v.

DENNIS HASTY, FORMER WARDEN OF THE METROPOLITAN DETENTION CENTER; MICHAEL ZENK, FORMER WARDEN OF THE METROPOLITAN DETENTION CENTER; JAMES SHERMAN, FORMER METROPOLITAN DETENTION CENTER ASSOCIATE WARDEN FOR CUSTODY,

Defendants-Appellants,

JOHN ASHCROFT, FORMER ATTORNEY GENERAL OF THE UNITED STATES; ROBERT MUELLER, FORMER DIRECTOR, FEDERAL BUREAU OF INVESTIGATION; JAMES W. ZIGLAR, FORMER COMMISSIONER, IMMIGRATION AND NATURALIZATION SERVICE,

Defendants-Cross-Appellees,

SALVATORE LOPRESTI, FORMER METROPOLITAN DETENTION CENTER CAPTAIN; JOSEPH CUCITI, FORMER METROPOLITAN DETENTION CENTER LIEUTENANT,

Defendants.

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 11th day of December, two thousand fifteen.

PRESENT: DENNIS JACOBS,
JOSÉ A. CABRANES,
ROSEMARY S. POOLER,
REENA RAGGI,
RICHARD C. WESLEY,
PETER W. HALL,
DEBRA ANN LIVINGSTON,
GERARD E. LYNCH,
DENNY CHIN,
RAYMOND J. LOHIER, JR.,
SUSAN L. CARNEY,
CHRISTOPHER F. DRONEY,
Circuit Judges.[1]

ORDER

Following disposition of this appeal, an active judge of the Court requested a poll on whether to rehear the case en banc. A poll having been conducted and there being no majority favoring en banc review, rehearing en banc is hereby **DENIED**.

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[1] Robert A. Katzmann, Chief Judge, took no part in the consideration or decision of this case.

Rosemary S. Pooler and Richard C. Wesley, Circuit Judges, concur by opinion in the denial of rehearing en banc.

Dennis Jacobs, José A. Cabranes, Reena Raggi, Peter W. Hall, Debra Ann Livingston, and Christopher F. Droney, Circuit Judges, dissent by opinion from the denial of rehearing en banc.

FOR THE COURT:
CATHERINE O'HAGAN WOLFE, CLERK

ROSEMARY S. POOLER and RICHARD C. WESLEY, Circuit Judges, concurring in the denial of rehearing en banc:

Our dissenting colleagues lament that the majority opinion in this matter presents the first circuit decision in the country allowing a *Bivens* claim for an "executive policy" enacted in response to a national emergency. We disagree. The majority opinion acknowledges that *Iqbal* confirmed that it was constitutionally permissible for the Attorney General to subject detainees with suspected ties to terrorism to restrictive conditions of confinement. The majority opinion is unanimous in concluding that plaintiffs have no claim in that regard.

Our differences arise from the significance of what we conclude is a plausibly pled allegation that the Attorney General ratified the rogue acts of a number of field agents in carrying out his lawful policy. The Attorney General is alleged to have endorsed the restrictive detention of a number of men who were Arabs or Muslims or both—or those who appeared to fit those categories—that resulted from the fear and frenzy in greater New York following the 9/11 attacks in which suspicion was

founded merely upon one's faith, one's appearance, or one's native tongue.

Moreover, the dissenters fail to note that two of the defendants in this case ran the Metropolitan Detention Center and are alleged to have filed false documents with regard to the risk assessments of detainees and to have encouraged a dangerous environment for those detainees at the facility. As alleged in the complaint and documented by the Inspector General's report and national media, this included assaults, daily strip searches, and numerous other degrading acts. All of these actions, were they to have occurred in a regular prison environment and been employed against an inmate not suspected of posing any security risk, would have been considered unlawfully punitive. See *Bell* v. *Wolfish*, 441 U.S. 520, 539 (holding that particular conditions or restrictions of pretrial detention must be reasonably related to a legitimate governmental objective); see also, *e.g.*, *Stoudemire* v. *Mich. Dep't of Corrs.*, 705 F.3d 560, 574 (6th Cir. 2013) ("'[A] strip search, by its very nature, constitutes an extreme intrusion upon personal privacy, as well as an offense to the dignity of the individual.'" (quoting *Wood* v. *Clemons*, 89 F.3d 922, 928 (1st Cir. 1996)). This view accords not only with *Iqbal*, but also with both our own prior precedent and the views expressed by several of our sister circuits in the wake of *Iqbal*. See, *e.g.*, *Walker* v. *Schult*, 717 F.3d 119, 125 (2d Cir. 2013); *Dodds* v. *Richardson*, 614 F.3d 1185, 1199 (10th Cir. 2010); *Starr* v. *Baca*, 652 F.3d 1202, 1208 (9th Cir. 2011).

This case has drawn this Court's attention now for over thirteen years. The majority opinion and dissent have analyzed many arguments (including Judge Raggi's *Bivens* concerns, which were not even advanced by the government) and hundreds of cases. The length of our

efforts now fills many pages. In our view, it is time to move the case forward.

DENNIS JACOBS, JOSÉ A. CABRANES, REENA RAGGI, PETER W. HALL, DEBRA ANN LIVINGSTON, and CHRISTOPHER F. DRONEY, Circuit Judges, dissenting from the denial of rehearing en banc:

In this case, a sharply divided panel makes our court the first in the nation to imply a *Bivens* damages action[1] against senior Executive Branch officials—including the former Attorney General of the United States and the Director of the FBI—for actions taken to safeguard our country in the immediate aftermath of the 9/11 attacks. See *Turkmen* v. *Hasty*, 789 F.3d 218 (2d Cir. 2015); *id.* at 265 (Raggi, J., dissenting in part). The question of whether to rehear this case en banc has now evenly divided the active judges of the court (6-6), which means defendants' petitions for rehearing will be denied. We six judges who voted for rehearing respectfully dissent from that denial.[2]

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[1] See *Bivens* v. *Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971).

[2] Our court's historic reluctance to revisit panel opinions en banc has been questioned both in cases where we are the outlier in a circuit split, see 2002 Judicial Conference of the Second Circuit, Remarks by Justice Ginsburg, 221 F.R.D. 38, 223 (2002) (suggesting Second Circuit might be "a bit too resistant to en banc rehearing"), and in cases where we have deemed the issues so important as to make Supreme Court review likely, cf. *Ricci* v. *DeStefano*, 530 F.3d 88, 93 (2d Cir. 2008) (Jacobs, C.J., dissenting from denial of rehearing en banc) ("If issues are important enough to warrant Supreme Court review, they are important enough for our full Court to consider and decide on the merits.").

The panel decision raises questions of exceptional importance meriting further review. These concern our court's faithful adherence to controlling Supreme Court precedent respecting (1) the narrow scope of *Bivens* actions, (2) the broad shield of qualified immunity, and (3) the pleading standard for plausible claims. Judge Raggi discusses each of these points in detail in her panel dissent. See *id.* at 265-302. We incorporate that opinion here, which allows us to avoid repeating its analysis in summarizing our reasons for seeking en banc review.

* * *

In June 2001, the Supreme Court observed that the threat of "terrorism" might demand "heightened deference to the judgments of the political branches with respect to matters of national security," including "forms of preventive detention" for illegal aliens. *Zadvydas* v. *Davis*, 533 U.S. 678, 696 (2001). Less than three months later, the deadliest terrorist attack in the history of this nation—committed by aliens operating under foreign direction—presented federal officials with what even the panel majority acknowledges were "unprecedented challenges" in protecting our homeland from further harm. *Turkmen* v. *Hasty*, 789 F.3d at 226.[3] Astoundingly, given these circumstances, this court now implies a *Bivens* damages action—a practice that is generally "disfavored," *Ashcroft* v. *Iqbal*, 556 U.S. 662, 675 (2009), and usually "unjustified," *Wilkie* v. *Robbins*, 551 U.S. 537, 550

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[3] See *Ashcroft* v. *Iqbal*, 556 U.S. 662, 667 (2009) (describing "vast" federal investigation "to identify the assailants and prevent them from attacking anew"); see also *Turkmen* v. *Hasty*, 789 F.3d at 277 n.19 (Raggi, J., dissenting in part) (discussing various events in five months following 9/11 that fueled fear of further imminent terrorist attacks).

(2007)—to expose the former Attorney General, FBI Director, and other federal officials to potentially unlimited personal liability for their efforts to provide such protection.[4]

We are the first court to use *Bivens* to this effect. Four Courts of Appeals—for the Fourth, Seventh, Ninth, and D.C. Circuits—have declined to extend *Bivens* to suits against executive branch officials for national security actions taken after the 9/11 attacks. See *Vance* v. *Rumsfeld*, 701 F.3d 193 (7th Cir. 2012) (en banc); *Doe* v. *Rumsfeld*, 683 F.3d 390 (D.C. Cir. 2012); *Mirmehdi* v. *United States*, 689 F.3d 975 (9th Cir. 2012); *Lebron* v. *Rumsfeld*, 670 F.3d 540 (4th Cir. 2012); see also *Meshal* v. *Higgenbotham*, 804 F.3d 417 (D.C. Cir. 2015); *Ali* v. *Rumsfeld*, 649 F.3d 762 (D.C. Cir. 2011); *Rasul* v. *Myers*, 563 F.3d 527 (D.C. Cir. 2009). The panel decision puts this court at odds not only with these sister circuits, but also with controlling Supreme Court precedent in the following three areas of law.

1. *The Proper Scope of Bivens Actions*

After implying damages actions against federal officials on three occasions in the decade between 1971 and 1980, the Supreme Court has never done so again.[5] Rather, it has consistently emphasized that *Bivens* actions are limited to a few established contexts, and that those contexts cannot be generalized to extend *Bivens* further. See *Wilkie* v. *Robbins*, 551 U.S. at 549-50. Only by rede-

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[4] It was the President of the United States who, by written instructions, assigned responsibility for homeland security after 9/11 to the Attorney General and FBI Director, as well as to the CIA Director. See *id.* at 273 n.9 (Raggi, J., dissenting in part).

[5] See *id.* at 267 (Raggi, J., dissenting in part) (tracing history of *Bivens* actions in Supreme Court).

fining the few established *Bivens* contexts at an impermissibly "high level of generality" has the panel majority here been able to avoid its obligation to consider whether a judicially implied damages action is "the best way" to implement constitutional guarantees in the unprecedented legal and factual circumstances of this case. *Id.* at 500, 561-62 (requiring such judgment to extend *Bivens*, and recognizing that Congress is usually in "far better position" than courts to evaluate impact of new species of litigation against those who act in public's behalf).[6]

The majority thereby further avoids consideration of various factors strongly counseling hesitation in extending *Bivens* here. See *Bush* v. *Lucas*, 462 U.S. 367, 378 (1983). These factors include the following:

(a) plaintiffs here challenge an executive policy, rather than individual rogue action, the typical *Bivens* scenario;[7]

(b) the challenged policy implicates the executive's immigration authority;[8]

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[6] See *id.* at 268-69 (Raggi, J., dissenting in part) (explaining why generalization of *Bivens* contexts elides requirement for considered judgment about "best way" to implement constitutional guarantees in particular legal and factual circumstances).

[7] See *id.* at 272-74 (Raggi, J., dissenting in part) (discussing why *Bivens* has never been considered "'proper vehicle for altering an entity's policy'" (quoting *Correctional Servs. Corp.* v. *Malesko*, 534 U.S. 61, 74 (2001))).

[8] See *id.* at 274-75 (Raggi, J., dissenting in part) (referencing Supreme Court's recognition that "'any policy toward aliens'" is so interwoven with foreign relations, war powers, and other matters "'so exclusively entrusted to the political branches of government as to be largely immune from judicial inquiry or interference'" absent congressional authorization (quoting *Harisiades* v. *Shaughnessy*, 342 U.S. 580, 588-89 (1952))).

(c) the policy further implicates the executive's responsibility for national security, here exercised in a time of crisis;[9] and

(d) Congress's failure to provide a damages remedy despite longstanding awareness of the concerns raised in this lawsuit.[10]

In opposing en banc review, the members of the panel majority attempt to minimize the significance of their *Bivens* ruling by asserting that it does not extend to executive policy challenges but applies only to the Attorney General's alleged ratification of "the rogue acts of a number of field agents in carrying out his lawful policy." Pooler and Wesley, JJ., Op. Concurring in Denial of Reh'g En Banc ("Pooler and Wesley, JJ., Op."), ante at [1]. The assertion is belied however both by (1) plaintiffs' complaint, which specifically sues the Attorney General and FBI Director for the policies they allegedly developed and created in response to the 9/11 attacks, see *Turkmen* v. *Hasty*, 789 F.3d at 227, 263 (quoting Compl. ¶¶39-49, 75); and (2) the majority's own opinion, which holds that plaintiffs can use a *Bivens* action against the Attorney General, FBI Director, and others to challenge, not any rogue actions by field agents, but the "MDC confinement policy" of holding 9/11 detainees in "'particular-

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[9] See *id.* at 275-78 (Raggi, J., dissenting in part) (quoting Supreme Court's observation that "'[m]atters intimately related to . . . national security are rarely proper subjects for judicial intervention'" in absence of congressional or constitutional authorization, such as habeas corpus guarantee (quoting *Haig* v. *Agee*, 453 U.S. 280, 292 (1981), and citing *Department of Navy* v. *Egan*, 484 U.S. 518, 529-30 (1988))).

[10] See *id.* at 278-80 (Raggi, J., dissenting in part) (tracing Congress's awareness).

ly restrictive'" conditions until cleared of terrorist connections. *id.* at 228 (emphasis added) (quoting Compl. ¶76); see *id.* at 239 (concluding that pleadings plausibly allege that Attorney General "affirmatively supported" restrictive conditions).

Our concurring colleagues further confuse the issue by lumping together certain challenged policy actions, *e.g.* daily strip searches, with rogue conduct not authorized by any policy, *e.g.* assaults. See Pooler and Wesley, JJ., Op., *ante* at [2]. Plaintiffs' ability to use a *Bivens* action against individual prison officers for such rogue conduct is not at issue on this appeal.

Thus, to ensure this court's adherence to controlling Supreme Court precedent regarding the narrow scope of *Bivens* actions in the context of the restrictive confinement policy challenge here at issue, we should rehear this case en banc.[11]

2. *The Broad Shield of Qualified Immunity*

Controlling Supreme Court precedent instructs that qualified immunity must be afforded defendants in this case unless the constitutional rights asserted by plaintiffs

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[11] This court's duty to follow Supreme Court precedent regarding the narrow scope of *Bivens* actions—a matter implicating the separation of powers critical to our constitutional structure, see *id.* at 266 n.2, 267 (Raggi, J., dissenting in part)—exists independently of any arguments made, or not made, by the government. See generally *Valdez* v. *United States*, 518 F.3d 173, 181-82 (2d Cir. 2008) (recognizing court's discretion to review unpreserved issue to remedy obvious misapplication of law). Compare Pooler and Wesley, JJ., Op., *ante* at [3] (asserting that concerns raised in panel dissent were not advanced by government on appeal), with *Turkmen* v. *Hasty*, 789 F.3d at 268 n.4 (Raggi, J., dissenting in part) (observing that government raised *Bivens* challenge in moving for dismissal but did not pursue after receiving relief on other grounds).

were so clearly established with respect to the "*particular* conduct" and the "specific context" at issue that every reasonable official would have understood that his conduct was unlawful. *Mullenix* v. *Luna*, 136 S. Ct. 305, 308 (2015) (emphasis in original) (internal quotation marks omitted); see *Ashcroft* v. *al-Kidd*, 131 S. Ct. 2074, 2080, 2083 (2011). The panel majority here maintains that plaintiffs, although lawfully arrested and detained, had a right not to be restrictively confined in the absence of an individualized suspicion of dangerousness. But it cites no case clearly establishing such a right, let alone a case clearly establishing the unlawfulness of defendants' particular conduct in light of the specific context of this case. See *Mullenix* v. *Luna*, 136 S. Ct. at 308. Instead, considerable precedent, including *Bell* v. *Wolfish*, 441 U.S. 520, 539 (1979), cited by our concurring colleagues, see Pooler and Wesley, JJ., Op., *ante* at [2], suggests that restrictive confinement of lawfully detained persons can be based on general, rather than individualized, suspicion of dangerousness.[12]

We should, therefore, review en banc the panel majority's denial of qualified immunity in the unprecedented circumstances of this case.[13]

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[12] See *Turkmen* v. *Hasty*, 789 F.3d at 277, 290-93 (Raggi, J., dissenting in part) (discussing *Florence* v. *Bd. of Chosen Freeholders*, 132 S. Ct. 1510, 1523 (2012); *Whitley* v. *Albers*, 475 U.S. 312, 316 (1986); *Block* v. *Rutherford*, 468 U.S. 576, 585-87 (1984); *Bell* v. *Wolfish*, 441 U.S. 520, 558 (1979), and detailing experiences giving rise to general suspicion in this case).

[13] In opposing en banc review, our concurring colleagues assert that "it is time to move the case forward." Pooler and Wesley, JJ., Op., *ante* at [3]. But qualified immunity dictates that damages actions not move forward unless the constitutional right at issue was so clearly established in the particular context of the case as to be beyond dis-

3. *The* Iqbal *Pleading Standard*

In its earlier review of this very case (then bearing a different caption), the Supreme Court made clear that to survive dismissal, plaintiffs had to plead a plausible claim grounded in a factual basis. See *Ashcroft* v. *Iqbal*, 556 U.S. at 678. The Court instructed that this standard could not be satisfied by pleading facts "merely consistent with a defendant's liability," because that fell "short of the line between possibility and plausibility." *Id.* (internal quotation marks omitted). As Judge Raggi's careful discussion of the pleadings and incorporated documents demonstrates, the majority's identification of viable claims, particularly policy-challenging claims against the Attorney General and FBI Director, frequently relies only on hypothesized possibilities,[14] or on conclusory assumptions or insinuations of discriminatory purpose that the Supreme Court has already rejected. See Pooler and Wesley, JJ., Op., *ante* at [1] (repeating conclusory assumptions).[15] The need to ensure faithful adherence to

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pute. See *Plumhoff* v. *Rickard*, 134 S. Ct. 2012, 2019 (2014) ("Qualified immunity is an immunity from suit rather than a mere defense to liability." (internal quotation marks and brackets omitted)); see also *Ashcroft* v. *Iqbal*, 556 U.S. at 685 (explaining that "basic thrust of the qualified-immunity doctrine is to free officials from the concerns of litigation, including avoidance of disruptive discovery" (internal quotation marks omitted)). Thus, we should not hesitate to take the time for en banc review to ensure that the Attorney General, FBI Director, and other officials are not subjected to further litigation based on rights not clearly established by law.

[14] See *Turkmen* v. *Hasty*, 789 F.3d at 282-90 (Raggi, J., dissenting in part) (explaining how majority's hypotheses as to possible involvement of Attorney General and FBI Director in challenged detentions are actually belied by record facts).

[15] In *Ashcroft* v. *Iqbal*, the Supreme Court stated that restrictive confinement of 9/11 detainees until cleared of terrorist activities did not

the Iqbal pleading standard, pronounced by the Supreme Court in this very case, is thus a further reason for en banc review.

* * *

To conclude, we observe that our court's failure to adhere to controlling Supreme Court precedent would raise a serious concern in any case. But here, that concern is compounded by the panel's departure from precedent in three areas of law. Further, this concern arises in a case requiring a former Attorney General and FBI Director, among other federal officials, to defend against claims for money damages based on a detention policy applied to illegal aliens in the immediate aftermath of a terrorist attack on this country by aliens. Together, these circumstances present important legal issues warranting full-court review.[16] Further, the Supreme Court has already once reviewed—and reversed—this court for allowing plaintiffs to pursue deficient claims against the Attorney

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state a constitutional claim absent plausible allegations that the restrictions were "due to" the detainees' "race, religion, or national origin." 556 U.S. at 683. Further, the Court held that the disparate impact on Arab Muslims of the hold-until-cleared policy was not enough to imply discriminatory intent given that the 9/11 attacks were carried out by Arab Muslim members of an Islamic fundamentalist group comprised largely of Arab Muslims. See *id.* at 682. Judge Raggi's dissent explains why *Iqbal*'s reasoning necessarily defeats plaintiffs' amended pleadings. See *Turkmen v. Hasty*, 789 F.3d at 295-300.

[16] While the focus of our concern in seeking en banc review is the panel majority's decision to allow plaintiffs to pursue damages against the Attorney General and FBI Director, Judge Raggi's dissent explains why plaintiffs' policy-based claims against other officials should also be dismissed, obviating the need for us to discuss them here. See *id.* at 293-95, 298-302.

General and FBI Director in this case. See *Ashcroft* v. *Iqbal*, 556 U.S. 662. This litigation history, when considered together with the sharp panel division, the even division (6-6) of active judges in the en banc poll, and our split from sister circuits, only reinforces the propriety of our rehearing this case ourselves in advance of any possible further consideration by the Supreme Court.

Accordingly, we dissent from the denial of defendants' petitions for en banc review.

APPENDIX D
RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

The United States Constitution provides in relevant part:

Amendment IV

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Amendment V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Title 42 of the United States Code provides in relevant part:

§ 1985. Conspiracy to interfere with civil rights

(1) Preventing officer from performing duties

If two or more persons in any State or Territory conspire to prevent, by force, intimidation, or threat, any person from accepting or holding any office, trust, or place of confidence under the United States, or from discharging any duties thereof; or to induce by like means any officer of the United States to leave any State, district, or place, where his duties as an officer are required to be performed, or to injure him in his person or property on account of his lawful discharge of the duties of his office, or while engaged in the lawful discharge thereof, or to injure his property so as to molest, interrupt, hinder, or impede him in the discharge of his official duties;

(2) Obstructing justice; intimidating party, witness, or juror

If two or more persons in any State or Territory conspire to deter, by force, intimidation, or threat, any party or witness in any court of the United States from attending such court, or from testifying to any matter pending therein, freely, fully, and truthfully, or to injure such party or witness in his person or property on account of his having so attended or testified, or to influence the verdict, presentment, or indictment of any grand or petit juror in any such court, or to injure such juror in his person or property on account of any verdict, presentment, or indictment lawfully assented to by him, or of his being or having been such juror; or if two or more persons conspire for the purpose of impeding, hindering, obstructing, or defeating, in any manner, the

due course of justice in any State or Territory, with intent to deny to any citizen the equal protection of the laws, or to injure him or his property for lawfully enforcing, or attempting to enforce, the right of any person, or class of persons, to the equal protection of the laws;

(3) Depriving persons of rights or privileges

If two or more persons in any State or Territory conspire or go in disguise on the highway or on the premises of another, for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; or for the purpose of preventing or hindering the constituted authorities of any State or Territory from giving or securing to all persons within such State or Territory the equal protection of the laws; or if two or more persons conspire to prevent by force, intimidation, or threat, any citizen who is lawfully entitled to vote, from giving his support or advocacy in a legal manner, toward or in favor of the election of any lawfully qualified person as an elector for President or Vice President, or as a Member of Congress of the United States; or to injure any citizen in person or property on account of such support or advocacy; in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages occasioned by such injury or deprivation, against any one or more of the conspirators.

APPENDIX E
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

No. 02 CV 2307 (JG)(SMG)

IBRAHIM TURKMEN, AKHIL SACHDEVA, AHMER IQBAL ABBASI, ANSER MEHMOOD, BENAMAR BENATTA, AHMED KHALIFA, SAEED HAMMOUDA, PURNA BAJRACHARYA, ON BEHALF OF THEMSELVES AND ALL OTHERS SIMILARLY SITUATED,

Plaintiffs,

v.

DENNIS HASTY, FORMER WARDEN OF THE METROPOLITAN DETENTION CENTER; MICHAEL ZENK, FORMER WARDEN OF THE METROPOLITAN DETENTION CENTER; JAMES SHERMAN, FORMER METROPOLITAN DETENTION CENTER ASSOCIATE WARDEN FOR CUSTODY; JOHN ASHCROFT, FORMER ATTORNEY GENERAL OF THE UNITED STATES; ROBERT MUELLER, FORMER DIRECTOR, FEDERAL BUREAU OF INVESTIGATION; JAMES W. ZIGLAR, FORMER COMMISSIONER, IMMIGRATION AND NATURALIZATION SERVICE; SALVATORE LOPRESTI, FORMER METROPOLITAN DETENTION CENTER CAPTAIN; JOSEPH CUCITI, FORMER METROPOLITAN DETENTION CENTER LIEUTENANT,

Defendants.

FOURTH AMENDED COMPLAINT AND DEMAND FOR JURY TRIAL

Plaintiffs Ibrahim Turkmen, Akhil Sachdeva, Ahmer Iqbal Abbasi, Anser Mehmood, Benamar Benatta, Ah-

med Khalifa, Saeed Hammouda, and Purna Raj Bajracharya (collectively "Plaintiffs") by and through their attorneys, allege the following:

NATURE OF ACTION

1. Plaintiffs bring this class action on behalf of themselves and a class of male non-citizens from the Middle East, South Asia, and elsewhere who are Arab, South Asian or Muslim or were perceived by Defendants to be Arab, South Asian or Muslim, and were arrested on minor immigration violations following the September 11, 2001 terrorist attacks on the United States ("9/11 detainees"). Each Plaintiff was subjected to a policy whereby any Muslim or Arab man encountered during the investigation of a tip received in the 9/11 terrorism investigation (called "PENTTBOM"), and discovered to be a non-citizen who had violated the terms of his visa, was arrested and treated as "of interest" to the government's terrorism investigation. This of interest treatment did not depend on any law enforcement evaluation; it was automatic and based solely on the race, national origin, and religion or perceived race, national origin, and religion of the Plaintiffs and class members. It did not matter whether the tip was wholly implausible, or even whether the non-citizen was the subject of the tip or just encountered incidentally. In fact, there was no reason to suppose Plaintiffs or class members had any connection to terrorism.

2. Nevertheless, each of interest Plaintiff was subjected to a blanket "hold-until-cleared" policy. Although they could have been removed promptly from the United States because of their immigration violations, pursuant to this policy they were instead retained by the agency then known as the Immigration and Naturalization Service ("INS") in immigration custody until the Federal

Bureau of Investigation ("FBI") affirmatively cleared them of terrorist ties. Eventually, all Plaintiffs and class members were in fact cleared of any connection to terrorism.

3. Plaintiffs and class members were detained without regard to whether they posed a danger or flight risk and were denied a timely hearing before a neutral judicial officer on whether probable cause existed to justify detaining them beyond the time necessary to secure their removal or voluntary departure from the United States. Instead of being presumed innocent until proven guilty, the 9/11 detainees were presumed guilty of terrorism until proven innocent to the satisfaction of law enforcement authorities.[1]

4. Some class members, like Turkmen and Sachdeva ("Passaic Plaintiffs") were detained in Passaic County Jail in New Jersey; others, like Abbasi, Mehmood, Benatta, Khalifa, Hammouda, and Bajracharya ("MDC Plaintiffs") were sent to the Metropolitan Detention Center ("MDC"), a federal facility in Brooklyn, New York. Some of these MDC Plaintiffs, like Hammouda and Benatta, were classified by the FBI as being "high interest" and placed in the most highly restrictive prison setting possible—the MDC's Administrative Maximum Special Hous-

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[1] The hold-until-cleared policy was well-documented in a report released by the Office of the Inspector General ("OIG") of the U.S. Department of Justice on June 2, 2003, entitled "The September 11 Detainees: A Review of the Treatment of Aliens Held on Immigration Charges in Connection with the Investigation of the September 11 Attacks." A copy of this report was appended to the Second Amended Complaint as Exhibit 1, and is incorporated by reference except where contradicted by the allegations of this Fourth Amended Complaint. It is also available at http://www.usdoj.gov/oig/special/0306/full.pdf.

ing Unit ("ADMAX SHU")—without any standards or procedures for making such a determination, or any information that they were dangerous or involved in terrorism. Others, like Abbasi, Bajracharya, Mehmood, and Khalifa, were placed in the ADMAX SHU even though they had not been classified "high interest" and despite the absence of any information indicating they were dangerous or involved in terrorism, or any other legitimate reason for such treatment. Although there are specific federal regulations for determining when to subject detainees to administrative or punitive detention, Defendants did not comply with these regulations in subjecting Plaintiffs and class members to this treatment.

5. At Passaic, the 9/11 detainees were kept from practicing their religion. While in the ADMAX SHU, the MDC Plaintiffs and class members were subjected to unreasonable and excessively harsh conditions. They were placed in tiny cells for over 23 hours a day and strip-searched, manacled, and shackled when taken out of their cells. They were physically and verbally abused by their guards. Many were badly beaten. The MDC Plaintiffs and class members were subjected to a communications blackout and other actions that interfered with their ability to communicate with the outside world, their access to counsel and their ability to seek redress in the courts. They were denied recreation and adequate hygiene supplies, and prevented from practicing their faith during their detention.[2]

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[2] This abuse was documented in a second OIG report, issued in December of 2003, entitled "Supplemental Report on September 11 Detainees' Allegations of Abuse at the Metropolitan Detention Center in Brooklyn, New York." The Supplemental Report was attached without appendices as Exhibit 1 to the Third Amended

6. By creating and implementing the policy to place MDC Plaintiffs and class members in unduly restrictive and punitive conditions of confinement, Defendants Ashcroft, Mueller and Ziglar violated Plaintiffs' and class members' rights under the First, Fourth and Fifth Amendments to the United States Constitution. By detaining Plaintiffs and class members in these conditions and ordering or condoning their abuse, Defendants Hasty, Zenk, Sherman, Lopresti, and Cuciti also violated Plaintiffs' and class members' rights under the First, Fourth and Fifth Amendments to the United States Constitution.

7. By arresting Plaintiffs and class members, detaining them under unreasonable and excessively harsh conditions Defendants Ashcroft, Mueller, Ziglar, Hasty, Zenk, Lopresti, and Cuciti also engaged in racial, religious, ethnic, and national origin profiling. Plaintiffs' and class members' race, religion, ethnicity, and national origin played a decisive role in Defendants' decision to detain them initially and to subject them to punitive and dangerous conditions of confinement in violation of the rights guaranteed to them by the Fifth Amendment to the United States Constitution.

8. Plaintiffs seek compensatory and punitive damages for themselves and all class members, and an award of costs and reasonable attorneys' fees.

JURISDICTION AND VENUE

9. This action is brought pursuant to *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcot-*

Complaint, and is incorporated by reference except where contradicted by the allegations of this Fourth Amended Complaint. It is also available at http://www.usdoj.gov/oig/special/0312/final.pdf.

ics, 403 U.S. 388 (1971), under the First, Fourth, and Fifth Amendments to the Constitution and 42 U.S.C. §1985(3).

10. This Court has jurisdiction under 28 U.S.C. §1331.

11. Venue is proper in the United States District Court for the Eastern District of New York pursuant to 28 U.S.C. §1391(b) because a substantial part of the events giving rise to Plaintiffs' claims occurred in this District.

JURY DEMAND

12. Plaintiffs demand trial by jury in this action on each and every one of their claims.

PARTIES

The MDC Plaintiffs

13. Plaintiff AHMER IQBAL ABBASI is a South Asian Muslim, and a native and citizen of Pakistan. He currently lives in Pakistan with his wife and three children and works as a supervisor at a construction company. Abbasi has never been involved with terrorists, terrorist organizations, or terrorist activity. Indeed, he abhors terrorism.

14. Plaintiff ANSER MEHMOOD is also a South Asian Muslim, and a native and citizen of Pakistan. He is Abbasi's brother-in-law. He currently lives in Pakistan with his father, wife, and four children. He has had difficulty finding work in Pakistan, and has had to rely on his father's financial support. Mehmood has never been involved with terrorists, terrorist organizations, or terrorist activity. Indeed, he abhors terrorism.

15. Plaintiff BENAMAR BENATTA is an Arab Muslim, a native of Algeria, and has protected refugee status in Canada. Benatta has not been able to find

steady work since his detention in the United States. He currently lives in Canada and is pursuing a graduate degree in Aeronautics at the University of Toronto. Benatta has never been involved with terrorists, terrorist organizations, or terrorist activity. Indeed, he abhors terrorism.

16. Plaintiff AHMED KHALIFA is an Arab Muslim, and a native and citizen of Egypt. He currently lives in Egypt with his parents. Khalifa is a doctor and works as a general practitioner. Khalifa has never been involved with terrorists, terrorist organizations, or terrorist activity. Indeed, he abhors terrorism.

17. Plaintiff SAEED HAMMOUDA is an Arab Muslim, and a native and citizen of Egypt. He currently lives in Egypt with his mother. He is the owner and manager of a medical supplies company called ADVA-MED. Hammouda has never been involved with terrorists, terrorist organizations, or terrorist activity. Indeed, he abhors terrorism.

18. Plaintiff PURNA RAJ BAJRACHARYA is a South Asian Buddhist, and a native and citizen of Nepal. He currently lives in Katmandu with his wife, sons, and daughters-in-law, and is retired. Bajracharya has never been involved with terrorists, terrorist organizations, or terrorist activity. Indeed, he abhors terrorism.

The Passaic Plaintiffs

19. Plaintiff IBRAHIM TURKMEN is Muslim, and a native and citizen of Turkey, where he lives with his wife and four daughters. Turkmen has never been involved with terrorists, terrorist organizations, or terrorist activity. Indeed, he abhors terrorism.

20. Plaintiff AKHIL SACHDEVA is a South Asian Hindu, and a native and citizen of India. He currently

lives in Canada. Mr. Sachdeva has never been involved with terrorists, terrorist organizations, or terrorist activity. Indeed, he abhors terrorism.

Defendants

21. At all times relevant to this complaint Defendant JOHN ASHCROFT was the Attorney General of the United States. As Attorney General, Ashcroft had ultimate responsibility for the implementation and enforcement of the immigration laws. He is the principal architect of the policies and practices challenged here, and he directed his subordinates to implement them. Along with a small group of high-level government employees, Ashcroft created the hold-until-cleared policy and directed the application of that policy to persons in the circumstances of Plaintiffs and the other class members. With that same group, he also created many of the unreasonable and excessively harsh conditions under which Plaintiffs and other class members were detained, and authorized others of those conditions. Ashcroft ordered the targeting of Muslims and Arabs based on his discriminatory belief that individuals with those characteristics who are unlawfully present in the United States are likely to be dangerous, or terrorists, or have information about terrorism. Ashcroft is sued in his individual capacity.

22. Defendant ROBERT MUELLER is the Director of the Federal Bureau of Investigation. Mueller was part of the small group of government employees who, under Ashcroft's direction, created the hold-until-cleared policy, directed the application of that policy to persons in the circumstances of Plaintiffs and the other class members, and decided Plaintiffs would be held in unreasonable and excessively harsh conditions of confinement. Mueller condoned the targeting of Muslims and Arabs based on his discriminatory belief that individuals with those char-

acteristics who are unlawfully present in the United States are likely to be dangerous, or terrorists, or have information about terrorism. Mueller is sued in his individual capacity.

23. At all times relevant to the complaint Defendant JAMES W. ZIGLAR was the Commissioner of the INS. As INS Commissioner, Ziglar had immediate responsibility for the implementation and enforcement of the immigration laws. He was the INS' chief executive officer. Ziglar was part of the small group of government employees who, under Ashcroft's direction, created the hold-until-cleared policy, directed the application of that policy to persons in the circumstances of Plaintiffs and the other class members, and decided Plaintiffs would be held in unreasonable and excessively harsh conditions of confinement. Ziglar condoned the targeting of Muslims and Arabs based on his discriminatory belief that individuals with those characteristics who are unlawfully present in the United States are likely to be dangerous, or terrorists, or have information about terrorism. Ziglar is sued in his individual capacity.

The MDC Defendants

24. Defendant DENNIS HASTY was the Warden of the MDC until the spring of 2002. While Warden, Hasty had immediate responsibility for the conditions under which MDC Plaintiffs and other class members were confined at the MDC. He ordered the creation of the ADMAX SHU at the MDC for the purpose of confining Plaintiffs and other class members under unreasonable and excessively harsh conditions in violation of the Constitution. He allowed his subordinates to abuse MDC Plaintiffs and class members with impunity by ignoring some evidence of this abuse and avoiding other evidence—for example, by neglecting to make rounds on the

ADMAX unit as required by BOP policy. Despite his attempt to remain blind to the conditions experienced by MDC Plaintiffs and class members, Hasty was made aware of the abuse that occurred through inmate complaints, staff complaints, hunger strikes, and suicide attempts, and did not take any actions to rectify or address the situation. Hasty is sued in his individual capacity.

25. Defendant MICHAEL ZENK was the Warden of the MDC in the Spring of 2002 and after. As Warden, Zenk had immediate responsibility for the conditions under which MDC Plaintiffs and other class members were confined at the MDC. He ordered that MDC Plaintiffs and other class members be confined in the ADMAX SHU of the MDC under unreasonable and excessively harsh conditions in violation of the Constitution. He also allowed his subordinates to abuse MDC Plaintiffs and class members with impunity. He made rounds on the ADMAX and was aware of conditions there. Zenk is sued in his individual capacity.

26. At all times relevant to this complaint, Defendant JAMES SHERMAN was the MDC Associate Warden for Custody. Sherman assisted the other defendants in creating the unreasonable and excessively harsh conditions in the ADMAX SHU and allowed his subordinates to abuse MDC Plaintiffs and class members with impunity. Sherman made rounds on the ADMAX SHU and was aware of conditions there. Sherman is sued in his individual capacity.

27. At all times relevant to this complaint, Defendant SALVATORE LOPRESTI was the Captain of the MDC, and thus had responsibility for supervising all MDC correctional officers, including those who worked on the ADMAX. Lopresti was also responsible for overseeing the

ADMAX unit. Lopresti took part in creating the unreasonable and punitive conditions on the ADMAX unit at the request of Hasty. Lopresti was frequently present on the ADMAX Unit, regularly reviewed documentation of some of the abuses, and received numerous complaints from 9/11 detainees about abuse and mistreatment. Despite this information, he did not take any actions to rectify or address the situation. Lopresti is sued in his individual capacity

28. At all times relevant to this complaint, Defendant JOSEPH CUCITI was First Lieutenant at the MDC, and was the institution's coordinator with law enforcement officers who sought to interrogate the 9/11 detainees. In that capacity he was responsible for escorts, processing, attorney/client and social visits, and other aspects of the 9/11 detentions. Cuciti drafted MDC's policies regarding conditions in the ADMAX SHU and developed the policy for strip-searches on the ADMAX Unit. Cuciti made rounds on the ADMAX SHU and reviewed logs created by that unit; in those and other ways he heard complaints from MDC Plaintiffs and class members regarding the conditions and abuse described below, yet failed to take any steps to rectify that abuse. Cuciti is sued in his individual capacity

CLASS ACTION ALLEGATIONS

29. Plaintiffs seek to represent a Plaintiff class consisting of all male non-citizens from the Middle East, South Asia and elsewhere who are Arab or Muslim, or were perceived by Defendants as Arab or Muslim, and who were:

a. arrested by the INS or FBI after the September 11, 2001 terrorist attacks and charged with immigration violations;

b. treated as being "of interest" to the government's terrorism investigation and subjected to a blanket "hold-until-cleared" policy pursuant to which they were held without bond, without evidence of dangerousness or flight risk, until cleared of terrorist ties by the FBI; and

c. detained at MDC or Passaic County Jail.

30. Plaintiffs and the other members of the class were subjected to the policies and practices described in paragraphs 1 through 7 of this Fourth Amended Complaint, and more fully hereafter.

31. The members of the class are too numerous to be joined in one action, and their joinder is impracticable, in part because Defendants kept their identities secret until long after they were deported from the United States. While the exact number is presently unknown to Plaintiffs' counsel, the Department of Justice Office of Inspector General was able to identify approximately 475 9/11 detainees who were held at MDC and Passaic and were subjected to the policies challenged in this action.

32. Common questions of law and fact exist as to all class members and predominate over questions that affect only the individual members. These common questions include:

a. whether Defendants adopted, promulgated, and implemented policies and practices depriving MDC Plaintiffs and class members of their liberty without due process of law in violation of the Fifth Amendment by subjecting them to outrageous, excessive, cruel, inhumane, and degrading conditions of confinement;

b. whether Defendants adopted, promulgated, and implemented a policy and practice of depriving Plaintiffs and class members of equal protection of the law in violation of the Fifth Amendment by placing them in restrictive conditions of confinement because of their race, religion, ethnicity, and/or national origin;

c. whether Defendants adopted, promulgated, and implemented a policy and practice which violated Plaintiffs' and class members' rights under the First Amendment to practice their religion.

33. Plaintiffs' claims are typical of those of the class for reasons that include the following:

a. each Plaintiff is a male non-citizen of Middle Eastern or South Asian descent who is Arab or Muslim, or was perceived by Defendants to be Arab or Muslim;

b. each Plaintiff was arrested and detained subsequent to the September 11 terrorist attacks and charged with minor (but deportable) immigration violations;

c. each Plaintiff was treated as "of interest" to the PENTTBOM investigation, and subjected to a blanket "hold-until-cleared" policy pursuant to which he was held in INS detention, without regard to evidence of danger or flight risk, until cleared of terrorist ties by the FBI;

d. each Plaintiff housed in MDC was held under unreasonable and excessively harsh conditions of confinement, and subjected to a communications blackout;

e. each Muslim Plaintiff was denied an opportunity to practice his religion; and

f. the race, religion, ethnicity and/or national origin of each Plaintiff (real or perceived) played a determinative role in Defendants' decision to detain him.

34. The legal theories on which Plaintiffs rely are the same or similar to those on which all class members would rely, and the harms suffered by them are typical of the harms suffered by the other class members.

35. Plaintiffs will fairly and adequately protect the interests of the class. The interests of the class representatives are consistent with those of the class members. In addition, Plaintiffs' counsel are experienced in class actions and civil rights litigation.

36. Plaintiffs' counsel know of no conflicts of interest among class members or between the attorneys and class members that would affect this litigation.

37. Use of the class action mechanism here is superior to other available methods for the fair and efficient adjudication of the claims and will prevent the imposition of undue financial, administrative, and procedural burdens on the parties and on this Court which individual litigation of these claims would impose.

38. The Plaintiff class should be certified pursuant to Rule 23(b)(3) of the Federal Rules of Civil Procedure because common questions of law and fact predominate and a class action is a superior way to fairly and efficiently adjudicate the controversy.

STATEMENT OF FACTS

The Ashcroft Sweeps & the Hold-Until-Cleared Policy

39. Immediately after September 11, Ashcroft created and implemented a policy of rounding up and detaining Arab and South Asian Muslims to question about terrorism. Under Ashcroft's orders, the round-up and detentions were undertaken without a written policy, to avoid creating a paper trail.

40. The FBI set up a tip line after September 11, and tips poured in from civilians across the nation. Within a week, 96,000 tips had been received, most of them based upon terrified citizens' discriminatory notions about Arabs and Muslims. Contrary to prior FBI practice, Mueller ordered that every one of these tips be investigated, even if they were implausible on their face, or based solely on suspicion of an individual due to his religion, ethnicity, country of origin or race.

41. While every tip was to be investigated, Ashcroft told Mueller to vigorously question any male between 18 and 40 from a Middle Eastern country whom the FBI learned about, and to tell the INS to round up every immigration violator who fit that profile. FBI field offices were thus encouraged to focus their attention on Muslims of Arab or South Asian descent. Both men were aware that this would result in the arrest of many individuals about whom they had no information to connect to terrorism. Mueller expressed reservations about this result, but nevertheless knowingly joined Ashcroft in creating and implementing a policy that targeted innocent Muslims and Arabs.

42. The FBI field offices followed this guidance in investigating Plaintiffs and class members. For example, the head of the New York FBI field office stated that an

individual's Arab appearance and status as a Muslim were factors to consider in the investigation. Another supervisor in the New York FBI field office who oversaw the clearance process stated that a tip about Russian tourists filming the Midtown tunnel was "obviously" of no interest, but that the same tip about Egyptians was of interest.

43. The resulting investigation focused on men who were Muslim and South Asian or Arab, or who were perceived as such. With a few exceptions, the detainees were almost entirely Muslim and South Asian or Arab. The few swept up for immigration violations during the PENTTBOM investigation who did not fit this profile were treated differently than Plaintiffs and class members. For example, five Israelis detained for allegedly celebrating on September 11 ended up at MDC, but they received legal and consular visits in early October, before anyone else in the unit, and they were among the first detainees to be moved from the ADMAX SHU to general population and dropped from the INS custody list, all without clearance letters from the FBI. Another detainee, who happened to be the roommate of an acquaintance of several of the hijackers, was also cleared quickly—within six weeks of his arrest; the FBI summary noted only his lack of relevance to the PENTTBOM investigation and that he was either Austrian or Australian. One detainee with a Spanish surname was picked up while investigators were following a lead about a Yemeni store owner, but determined to be of "no PENTTBOM connection" without any clearance investigation, or even the assignment of an investigator. Thus the New York FBI field office was authorized to release him without any clearance letter from FBI headquarters in contradic-

tion to the hold-until-cleared policy applied to Muslim, Arab and South Asian non-citizens.

44. In contrast, Muslim, Arab and South Asian non-citizens were treated as "of interest" to the PENTTBOM investigation without a determination by any FBI or other law enforcement officer that the non-citizen had engaged in any suspicious behavior, or identification of any reason to believe the individual had information about terrorism or was involved in the 9/11 attacks.

45. In the words of one high-ranking Department of Justice official, there was "custody without triage"—that is, without any attempt to sift out detainees of actual interest to the investigation from those who were not. There was, said the same official, "no clear vetting" of detainees, and he was concerned early in the investigation that detainees were being held simply on the basis of their ethnicity. Similarly, Defendant Mueller told OIG investigators that he was not aware of any guidance or policy for determining whether a detainee was of special interest.

46. Several highly placed law enforcement officers, including the Assistant Director in Charge of the New York field office of the FBI, disagreed with this approach and challenged its implementation, arguing that law enforcement efforts must focus on individuals for whom the office had developed evidence were connected to terrorism. Their expertise was ignored.

47. Ashcroft, Mueller and Ziglar received detailed daily reports of the arrests and detentions and were aware that the FBI had no information tying Plaintiffs and class members to terrorism prior to treating them as "of interest" to the PENTTBOM investigation. Indeed, in October 2001 all three learned that the New York field

office of the FBI was keeping a separate list of non-citizens, including many Plaintiffs and class members, for whom the FBI had not asserted any interest (or lack of interest). Against significant internal criticism from INS agents and other federal employees involved in the sweeps, Ashcroft ordered that, despite a complete lack of any information or a statement of FBI interest, all such Plaintiffs and class members be detained until cleared and otherwise treated as "of interest." Mueller and Ziglar were fully informed of this decision, and complied with it.

48. Ashcroft, Mueller, and Ziglar's decision to hold these hundreds of non-citizens for criminal investigation without evidence of any ties to terrorism was based on their discriminatory notion that all Arabs and Muslims were likely to have been involved in the terrorist attacks, or at least to have relevant information about them.

49. Pursuant to this policy, the FBI directed the INS to arrest and detain well over 1,200 male non-citizens from the Middle East, South Asia, and elsewhere who appeared to be Arab or Muslim, including Plaintiffs and class members, on minor immigration violations—such as overstaying visas, working illegally on tourist visas, or failing to meet matriculation and/or course work requirements for student visas.

50. While the INS had previously sought to remove non-citizens for these violations, it generally did not detain them during their removal proceedings.

51. The Immigration and Nationality Act ("INA") provides that "an alien may be arrested and detained pending a decision on whether the alien is to be removed from the United States." INA §236(a); 8 U.S.C. §1226(a). However, only non-citizens with certain crimi-

nal convictions fall within the INA's "mandatory detention" provision. INA §236(c); 8 U.S.C. §1226(c). Plaintiffs squarely fall within the discretionary detention statute, and therefore must be provided an individualized custody determination by the Service and, if requested, by an Immigration Judge. The INS took a different approach with Plaintiffs and class members, not because they violated the immigration laws—that alone does not justify de facto mandatory immigration detention—but rather because Ashcroft, Mueller and Ziglar categorized them as potential (although not actual or even probable) terrorists based on vague suspicions rooted in racial, religious, ethnic, and/or national origin stereotypes rather than in hard facts.

52. Many 9/11 detainees were held for weeks or months in INS facilities, federal detention centers, or county jails, without any charges being filed against them and without any hearing on the reasons for their detention. Eventually, the INS filed civil charges against most 9/11 detainees, alleging minor immigration violations. In the months to come, some detainees were also charged with minor criminal offenses related to their immigration violations, like possession of a fraudulent social security card.

53. Because the FBI lacked probable cause to hold Plaintiffs and class members on criminal charges, Ashcroft ordered Mueller and Ziglar to use the immigration law as a pretext to detain the 9/11 detainees while investigating them for potential ties to terrorism. Although Plaintiffs and class members were purportedly being held under the authority of the civil immigration law, Ashcroft placed Michael Chertoff, the Assistant Attorney General in charge of the Criminal Division, in charge of the round-ups.

54. After immigration hearings, Plaintiffs and class members received final removal orders or accepted voluntary departure orders. Even though the INS could have promptly secured the removal or voluntary departure of these individuals, it kept them in custody for up to five months or more after the issuance of their final immigration orders—far longer than necessary to secure their departure from the United States, and well beyond the time that the INS is statutorily authorized to detain them. 8 U.S.C. §1231(a)(1) (90-day removal period); 8 U.S.C. §1229c(b)(2) (60-day period for voluntary departure granted at the conclusion of removal proceedings).

55. Plaintiffs and class members were kept in custody after the issuance of final removal or voluntary departure orders pursuant to Ashcroft's order that all non-citizens encountered during the PENTTBOM investigation be held in custody until they received a "clearance" from the FBI absolving them of any link to terrorists or terrorist activities. FBI clearances frequently took four months or longer. Ziglar, although concerned that the detentions overstepped the INS's statutory authority, complied with this requirement. So did Mueller. Ashcroft, Mueller, and Ziglar implemented this policy because of the same race, religion, and national origin stereotypes that prompted them to detain Plaintiffs in the first place.

56. These policies were created at the highest levels of Government, and their implementation was closely overseen by Ashcroft, Mueller, and Ziglar. Initially, the PENTTBOM investigation, consistent with FBI policy, was run out of the FBI field offices. But shortly after September 11, Mueller changed that policy, and ordered that the investigation would be run out of FBI Headquarters, under his direct control. The nerve center of

the 9/11 investigation was the Strategic Information and Operations Center, called SIOC, at FBI Headquarters.

57. Mueller personally directed the investigation out of SIOC for the FBI and was in daily contact with the FBI field offices regarding the status of individual clearances. Even after the New York field office of the FBI determined that a Plaintiff or class member had no connection to terrorism, Mueller would not authorize that person to be "cleared" until Headquarters reviewed and signed off on the details of the investigation and received a completed name trace from the Central Intelligence Agency ("CIA"). Many 9/11 detainees, including all of the MDC Plaintiffs, were cleared by the New York field office of any connection to terrorism and then detained for months in restrictive confinement while Headquarters considered their cases. Concerns expressed by FBI field office personnel about this delay were ignored by Headquarters. Mueller made this change because of the same race, religion, and national origin stereotypes that prompted him to detain Plaintiffs in the first place.

58. As a matter of policy and practice, and in keeping with its "hold-until-cleared" policy, the INS did not conduct post-order custody reviews for 9/11 detainees held more than 90 days after their final removal orders. These reviews are required by the INS regulations at 8 C.F.R. § 241.4, and provide that detainees must be given 30 days' notice of the review and that the INS must complete the review 90 days after the issuance of a final removal order. Plaintiffs and class members were not given notice of such a review and no such review was conducted.

59. No one told Plaintiffs and class members why they had been singled out for prolonged investigation and denied custody reviews. Many were told they would be

deported shortly after they received final orders, as required by the immigration law. Months passed and they remained in custody, leading them to believe they might be held forever.

60. Ashcroft, Mueller and Ziglar adopted, promulgated, and implemented these detention policies based on invidious animus against Arabs and Muslims, in violation of the First and Fifth Amendments to the Constitution. Evidence of this invidious animus includes:

a. there was no non-discriminatory reason to hold Plaintiffs and class members for investigation, yet Ashcroft, Mueller, and Ziglar delayed their deportation and placed them in restrictive confinement anyway;

b. these unconstitutional detention policies have not been applied to all noncitizens in the United States alleged to have violated the immigration laws;

c. the few individuals arrested in the sweeps who did not fit this profile were cleared quickly, or moved into general population without clearance;

d. Plaintiffs and class members were verbally abused and subjected to statements slandering the Muslim faith and their adherence to it by the Defendants, including Ashcroft, who expressed anti-Muslim sentiments, including a statement identifying Christianity by its central theological tenet, but Islam, in contrast, by the views of a small group of extremists: "Islam is a religion in which God requires you to send your son to die for him. Christianity is a faith in which God sends his son to die for you.";

e. Plaintiffs and class members were targeted for disparate treatment by Ashcroft, who announced the policy that Plaintiffs and class members would be arrested and detained for any reason regardless of the de minimis nature of their infractions, and thereby eliminated for Plaintiffs and class members any access to the fair and reasonable discretion of law enforcement officials. This fair and reasonable discretion remained available to non-Arab and non-Muslim individuals who were non-citizens. Defendant Ashcroft's policy announcement stated: "Let the terrorists among us be warned. If you overstay your visa even by one day, we will arrest you. If you violate a local law we will . . . work to make sure that you are put in jail and . . . kept in custody as long as possible." Although Ashcroft referred in this statement to "terrorists," it describes the policy he applied to Arab and South Asian Muslims with no connection to terrorism.

f. Consistent with Defendant Ashcroft, Mueller and Ziglar's personal bias against Muslims, South Asians, and Arabs, the Defendants also directed the Department of Justice to engage in the following policies, not challenged by this lawsuit, but also based entirely on suspicion of individuals because they belonged to these particular groups: (1) The Absconder Apprehension Initiative, which was designed to "locate, apprehend, interview, and deport" approximately "several thousand" individuals from predominantly Muslim countries. See Memorandum, the Deputy Attorney General,

U.S. Dep't of Justice, Guidance for Absconder Apprehension Initiative (Jan. 25, 2002); (2) Mandatory detention for asylum seekers from Arab and South Asian nations. See http://www.humanrightsfirst.org/asylum/torchlight/newsletter/newslet12.htm; (3) Special registration, which requires aliens from Arab and South Asian countries, almost all of which are predominantly Muslim, to report to immigration authorities to be fingerprinted and photographed, and often interrogated and detained. See Registration of Certain Nonimmigrant Aliens From Designated Countries, 68 Fed. Reg. 8046 (Feb. 19, 2003); 68 Fed. Reg. 2363 (Jan. 16, 2003); 67 Fed. Reg. 77,642 (Dec. 18, 2002); 67 Fed. Reg. 77,136 (Dec. 16, 2002); 67 Fed. Reg. 70,526 (Nov. 22, 2002); 67 Fed. Reg. 67,766 (Nov. 6, 2002); 67 Fed. Reg. 57,032 (Sept. 6, 2002); (4) According to sources within the Department of Justice, Ashcroft also ordered the INS and FBI to investigate individuals with Muslim-sounding names from vast sources of data, including INS records of entering noncitizens, as well as the phonebook.

Conditions of Confinement & Abuse

61. In the first few months after 9/11, Ashcroft and Mueller met regularly with a small group of government officials in Washington and mapped out ways to exert maximum pressure on the individuals arrested in connection with the terrorism investigation, including Plaintiffs and class members. The group discussed and decided upon a strategy to restrict the 9/11 detainees' ability to contact the outside world and delay their immigration hearings. The group also decided to spread

the word among law enforcement personnel that the 9/11 detainees were suspected terrorists, or people who knew who the terrorists were, and that they needed to be encouraged in any way possible to cooperate.

62. Commissioner Ziglar was at many of these meetings, and he discussed the entire process of interviewing and incarcerating out-of-status individuals with Ashcroft and others.

63. Ashcroft insisted on regular, detailed reporting on arrests. He wanted precise numbers, and received a daily Attorney General's Report on persons arrested and other developments of interest. He used this report for daily briefings of the President and the National Security Council on the progress of the investigation.

64. Ziglar was ultimately responsible for providing much of this information to Ashcroft, and had twice daily briefings with his staff regarding the 9/11 detentions.

65. The punitive conditions in which MDC Plaintiffs and class members were placed were the direct result of the strategy mapped out by Ashcroft and Mueller's small working group. These conditions were formulated in consultation with the FBI, and designed to aid interrogation. Indeed, sleep deprivation, extremes of temperature, religious interference, physical and verbal abuse, strip-searches, and isolation are consistent with techniques developed by the C.I.A. to be utilized for interrogation of "high value detainees."

66. There were not enough secure beds in federal jails like MDC to hold all the 9/11 detainees, so Ashcroft, Mueller and Ziglar's orders to encourage the 9/11 detainees to cooperate were implemented differently for the Passaic Plaintiffs and class members. Passaic Plaintiffs were denied the ability to practice their

religion, were held in overcrowded general population units with convicted felons, and were subjected to physical and verbal abuse, including being menaced by dogs. However, they were not held in isolation or otherwise placed in restrictive confinement.

67. Ashcroft, Mueller and Ziglar knew that the FBI had not developed any reliable evidence tying Plaintiffs and class members to terrorism, yet authorized their prolonged detention in restrictive conditions nonetheless. Indeed, Mueller ordered that MDC Plaintiffs and class members be kept on the INS Custody list (and thus in the ADMAX SHU) even after local FBI offices reported that there was no reason to suspect them of terrorism. For Mueller, the absence of suspicion was not enough; the CIA, which had no role in arresting class members or designating them "of interest," had to be asked if it could find some basis for suspicion.

68. To implement Ashcroft, Mueller and Ziglar's policy, Wardens Hasty and Zenk ordered their subordinates to ignore BOP regulations regarding detention conditions. BOP regulations limit the circumstances in which detainees may be placed in the SHU and require an employee known as the Segregation Review Official to conduct a weekly review of the status of each inmate housed in the SHU after he has spent seven days in administrative detention or disciplinary segregation. The Segregation Review Official is also required to conduct a formal hearing every 30 days assessing the inmate's status. These review processes were not conducted for the 9/11 detainees. Instead, Wardens Hasty and Zenk ordered prolonged placement of MDC Plaintiffs and class members in the ADMAX SHU without following the processes they knew the law required for such deprivation. Reports for 9/11 detainees in MDC's

ADMAX SHU were automatically annotated with the phrase "continue high security," and no hearing took place. Plaintiffs and class members were thus denied a fair review process in which to challenge their conditions of confinement.

69. MDC Defendants were aware that the FBI had not developed any information to tie the MDC Plaintiffs and class members they placed in the ADMAX SHU to terrorism. On a regular basis, an MDC intelligence officer received print-outs of the FBI and INS's 9/11 detainee lists and databases so that he could update Hasty, Sherman, and Lopresti about the investigations. These regular written updates included summaries of the reason each detainee was arrested, and all evidence relevant to the danger he might pose to the institution. Hasty, Sherman and Lopresti shared the information with Cuciti and other MDC staff.

70. The updates demonstrated the dearth of information connecting MDC Plaintiffs and class members to terrorism or raising a concern that they might pose a danger to the facility. For example, with respect to Khalifa, MDC Defendants were informed only that he was arrested because he was "encountered by INS" while following an FBI lead and charged with a violation of the INA. They were further informed that Khalifa had no INS applications, petitions or extensions pending, and that the "FBI may have an interest" in him. No other information was provided. As the briefing was designed to alert MDC staff to all information relevant to the question of whether Khalifa posed a security threat to the institution, the lack of any specific or incriminating information put MDC Defendants on notice of the inappropriateness of holding all 9/11 detainees in restrictive confinement without individualized assessments.

71. Similarly, MDC Defendants were informed that Mehmood was arrested because he was "encountered" by federal agents while executing a search warrant pursuant to an FBI lead; that his residence contained documents related to fraudulent Pakistan passports, credit card fraud, and "other criminal violations"; that he was charged with a "B1 [visa] overstay," and that he was in possession of fraudulent Social Security cards. The update included no statement of FBI interest in Mehmood.

72. MDC Defendants were informed that Abbasi was "encountered" by INS pursuant to an FBI lead; that he used a fraudulent passport to enter the U.S. to seek asylum, and later destroyed that passport; that he requested and was denied various forms of immigration relief; that he obtained and used a fraudulent advance parole letter to enter the country, and that he was thus inadmissible. The update included no statement of FBI interest in Abbasi.

73. The exact language of these updates was repeated weekly, indicating the continued lack of any information tying Khalifa, Mehmood, or Abbasi to terrorism, or tending to show that any of them might pose a danger. Despite this clear demonstration that the FBI had no information to connect the 9/11 detainees to terrorism or suspect them of dangerousness, Hasty, Sherman, and Lopresti continued to hold all the MDC Plaintiffs and class members in restrictive and punitive confinement, without undertaking the required individualized assessment of whether each individual posed a danger to the facility or otherwise required close supervision.

74. Hasty, Sherman, Lopresti, and Cuciti were aware that placing the 9/11 detainees in the ADMAX SHU unit without an individualized determination of dangerous-

ness or risk was unlawful; thus, Lopresti signed a document that was prepared by Cuciti, and approved by Hasty and Sherman, which untruthfully stated that the executive staff at MDC had classified the "suspected terrorists" as "High Security" based on an individualized assessment of their "precipitating offense, past terrorist behavior, and inability to adapt to incarceration." In reality, none of the MDC Defendants saw or considered information in any of these categories in deciding to place the 9/11 detainees in the ADMAX SHU. Indeed, after a few months of interacting with MDC Plaintiffs and class members, the MDC Defendants realized that they were not terrorists, but merely immigration detainees. Nevertheless, the restrictive conditions and harsh treatment continued.

75. To carry out Ashcroft, Mueller and Ziglar's unwritten policy to subject the 9/11 detainees to harsh treatment designed to obtain their cooperation, Hasty ordered Lopresti and Cuciti to design extremely restrictive conditions of confinement. These conditions were then approved and implemented by Hasty and Sherman, and, later, by Zenk.

76. As a result, detention in the ADMAX SHU entailed severe deprivations of liberty beyond those authorized by the BOP for administrative or disciplinary segregation. An ADMAX SHU is a particularly restrictive type of SHU not found in most BOP facilities because the normal SHU is usually sufficient for correcting inmate misbehavior and addressing security concerns. Indeed, the only other ADMAX SHU in existence at the time of Plaintiffs' detentions was the BOP's high security unit in Florence, Colorado, where the most dangerous convicted criminals are held. The ADMAX SHU at MDC was established after September 11, 2001

to make available more restrictive confinement. Unlike the regular SHU, in the ADMAX SHU detainees were handcuffed, shackled, chained, and accompanied by four guards whenever they left their cell, which was only permitted for extremely limited purposes. Two cameras were placed in each cell to monitor each inmate 24 hours a day, hand-held cameras recorded their movements whenever they left their cells, and the lights were left on 24 hours a day. Unlike detainees in the general population at MDC, detainees in the ADMAX SHU were detained in their cell for at least 23 hours a day, and were not allowed to move around the unit, use the telephone freely, or keep any property, even toilet paper, in their cell. MDC Plaintiffs and class members were subjected to these restrictive conditions in the ADMAX SHU for between three and eight months pursuant to a written policy drafted by Cuciti, signed by Lopresti, and approved by Sherman and Hasty, and subsequently by Zenk.

77. Further, Hasty facilitated his subordinates' multifaceted abuse of MDC Plaintiffs and class members by referring to the detainees as "terrorists," purposely avoiding the ADMAX unit, and isolating them from any avenue of complaint or assistance. All the MDC Defendants allowed Plaintiffs and class members to be beaten and harassed by ignoring direct evidence of such abuse, including logs and other official documents, videotapes, and detainee complaints. MDC Defendants used the harsh detention conditions as an intentional means of punishing, harassing, and "breaking" the MDC Plaintiffs and class members.

78. When a few MDC staff members brought allegations of abuse to the attention of Hasty and other senior MDC officials, they were called snitches, threat-

ened, and subjected to harassment by many other staff members at the facility. The campaign of harassment was so pervasive that one MDC employee estimated that half of the staff at MDC stopped speaking to him after he wrote a confidential memo to the Warden detailing detainees' complaints that was then distributed to the staff members on the ADMAX unit. The harassment went unpunished.

COMMUNICATIONS BLACKOUT AT MDC

Policy to Hold Detainees Incommunicado

79. Hasty implemented Ashcroft, Mueller, and Ziglar's explicit policy to limit MDC Plaintiffs' and class members' access to the outside world in several different ways. First, the 9/11 detainees were subjected to a communications blackout. MDC written policy (created by Lopresti and Cuciti, and approved by Hasty and Sherman) stated that the 9/11 detainees were not to be provided any social or legal visits or telephone calls. This blackout lasted until mid-October.

80. At the same time, individuals who sought to contact MDC Plaintiffs and class members were rebuffed. The arrest, processing, and detention of the 9/11 detainees were shrouded in secrecy. Family members, friends, and attorneys of men who had suddenly disappeared had great difficulty finding out whether they had been arrested and detained, and if so, where they were being held. Once they were classified as "special interest cases," 9/11 detainees' immigration hearings were closed, not only to the general public, but also to family members, and their case records were sealed.

81. MDC Plaintiffs and class members were classified within the BOP as "WITSEC" (Witness Security). The WITSEC designation is intended to protect cooperating

witnesses from reprisal, and operates to prohibit BOP staff from disclosing to any individual, even a family member or lawyer, the designee's location. Based on the WITSEC designation, MDC staff repeatedly turned away any relative or lawyer who came to the MDC in search of a detainee by falsely stating that the detainee was not there.

82. For example, after Mehmood was arrested, his wife Uzma tried to find out what was going on by visiting the local police department, and calling the FBI. The FBI told her that Mehmood was in INS custody and gave her a phone number to call to ascertain Mehmood's location. When she called the INS, however, they would not tell her where her husband was being held. Eventually, she hired a lawyer who learned that Mehmood was being held at MDC. But even with the help of counsel, she was unable to communicate with her husband for three months.

Post-Blackout Restriction on Communication and Access to Counsel

83. Beginning around the middle of October 2001, MDC Plaintiffs and class members were theoretically permitted non-contact visits and telephone calls. By MDC policy, they were allowed one call per week to an attorney and one social call per month. In practice, they were frequently denied even these limited calls.

84. In many instances, the unit counselor inquired whether 9/11 detainees in the ADMAX SHU wanted their weekly legal call by asking, "Are you okay?" Many detainees did not realize that an affirmative response to this casual question meant they opted to forgo their legal call for that week.

85. When MDC Plaintiffs and class members were actually offered calls, an MDC employee would bring a phone to each cell, often before offices opened for business, and each inmate who requested a phone call was required to place a call request form outside of his cell. Often, the officers would pretend to dial a number, or deliberately dial the wrong number and then claim that the line was dead or busy. They would then refuse to dial again, saying the call failed to go through and that the detainee had exhausted his quota of calls for the week or month. Legal calls that resulted in a wrong number, busy signal or calls answered by voicemail counted as their one legal call for that week. According to MDC documents, Hammouda, for example, was not able to make a legal call until November 7, and it appears the call was unsuccessful, as the records indicate it lasted only two minutes. His next opportunity was November 19, and when that call was incomplete, he was not given another opportunity until November 27. His call on that day lasted only five minutes. Similarly, Abbasi attempted a legal call on December 17, but it was incomplete. MDC records show that he did not try again until February 12, when he made a call that lasted three minutes. Khalifa made a legal call on October 15, but did not receive another opportunity until November 7. Bajracharya was not aware that he could make a legal call until December 3, 2001. On December 17, 2001 he again attempted to make a legal call, but MDC records show the call was incomplete. He did not get another opportunity until January 4, 2002, at which point MDC records show that he made a phone call lasting two minutes.

86. Once the MDC Plaintiffs and class members were permitted social calls at MDC, in or about the middle of

October 2001, these, too, were severely restricted in the same ways. Mehmood, for example, was not able to get through to his wife for three months, because the MDC employee responsible for providing phone calls counted an attempted call, even one that did not go through for technical reasons, as the one monthly call. Hammouda received his first social call on December 18. Abbasi was offered a social call for the first time on October 19, but the number he wanted to call was not on his inmate list, and thus he lost his opportunity to make any call that month. His next opportunity to make a social call was on November 13, but the call was not accepted. He didn't get another chance until December 26. Khalifa tried unsuccessfully to make a call on October 19, and did not try again until December 10. That attempt was also unsuccessful. Bajracharya was first able to attempt a social call on December 18, but that attempt was unsuccessful. Indeed, MDC records indicate that he was only able to complete one social call in his entire time at MDC, and that call lasted 4 minutes. MDC records show that Khalifa did not have a single successful social call. Benatta was only ever able to get through to an answering machine.

87. MDC Plaintiffs and class members were so upset by their lack of access to the outside world that many went on hunger strike to protest the situation, and one class member attempted suicide by strangling himself with his bed sheet.

88. Legal and social visits were non-contact; a detainee was separated from his visitor by thick plexiglass. Despite the lack of contact, MDC Plaintiffs and class members were cuffed and shackled throughout the visit, and strip-searched both beforehand and afterwards. Social visits were restricted to immediate family. Thus,

Abbasi, Benatta, Bajracharya and Khalifa never received a single social visit throughout their imprisonment on the ADMAX.

89. December 17, 2001 was Eid, the Muslim holiday that marks the end of the Ramadan fast. Mehmood's wife and children went to MDC to visit him, but were told he was not there. They left without being able to see Mehmood, or deliver to him the prayer rug and food they had brought. Mehmood's wife was finally granted a non-contact visit on January 11, 2002. Mehmood's children were not allowed to visit until he was moved to the general population at MDC in February 2002.

90. Hammouda's wife had a similar experience. Twice she was turned away and told her husband was not at MDC. On another occasion she arrived at MDC at the time she had been instructed she could visit, and was told visiting hours were over. These troubles continued throughout the spring of 2002.

91. Demonstrations protesting the treatment of 9/11 detainees were held weekly outside the MDC starting in November, but the ADMAX SHU cell windows were painted over to keep the detainees from seeing the protestors.

92. The MDC Plaintiffs and class members were not provided with sufficient information to obtain legal counsel. Immigration detainees typically receive a list of organizations that provide free legal services, but the list given to 9/11 detainees was woefully inadequate, containing much inaccurate and outdated information. The MDC Plaintiffs and class members had great difficulty obtaining legal representation, and some were held for months following their arrest while their lawyers

and their families made unsuccessful requests to learn their status and whereabouts.

93. Abbasi tried to secure counsel by calling names on the list of pro bono counsel provided by the facility, but got no response. He finally managed to contact his sister, Uzma, after about three months in detention. She arranged to secure an attorney to represent him with respect to his criminal charges. Once he retained an attorney, he was able to call that attorney for two to three minutes at a time, although MDC personal remained within hearing distance of his conversation at all times. He was not able to meet with an attorney until December 28, 2001. Khalifa's first legal visit was on November 1, 2001. The attorney he met with told him she would be at his immigration hearing, but when the time came, she was not present. He was unable to reach her after that. He tried calling some of the numbers on the pro bono counsel list, but was unable to reach anyone.

94. Some MDC Plaintiffs found their access to counsel blocked even during immigration hearings. Mehmood had a hearing before an immigration judge at MDC on October 16. When he explained to the judge that he had been unable to contact a lawyer, the judge postponed the hearing until October 25, 2001.

95. Benatta also had to attend an immigration hearing without a lawyer. In fact, he didn't even know he was going to have a hearing until he was ordered out of his cell by MDC guards and taken before an immigration judge. During that hearing, Benatta complained to the immigration judge about how tightly he was restrained, so the judge asked the corrections officers to check him during a break. The guards pulled Benatta's chains even tighter, and asked him if he wanted to complain again. Benatta also told the immigration judge that he was

being denied phone calls. Word of his complaint got back to MDC staff, and resulted in even more restricted access.

96. While civil liberties, civil rights, and immigrant advocacy organizations sought to provide free legal services to 9/11 detainees, the MDC substantially limited such organizations' access to 9/11 detainees by order from DOJ headquarters, in keeping with Ashcroft, Mueller and Ziglar's policy to isolate the detainees. MDC employees as well as others within the BOP and INS refused to disclose detainees' names, the facilities in which they were held, or information about their cases. They also denied requests by civil liberties, civil rights, and immigrant advocacy organizations to visit BOP facilities or county jails to screen 9/11 detainees in need of legal assistance. These requests were considered and rejected at Main Justice.

97. These unnecessary restrictions led to repeated complaints by 9/11 detainees, some of which were brought to the attention of Hasty, Zenk, Sherman, Lopresti, and Cuciti. The interference was also documented in legal call and social call logs prepared by MDC staff for review by Hasty, Zenk, Sherman, and Lopresti.

Video and Audio Taping Attorney/Client Conversations

98. In deliberate violation of the law, Hasty ordered his subordinates, including the other MDC Defendants, to audiotape detainees' visits with their attorneys. Such recording of inmates' meetings with attorneys (which was done by using a videotape camera that also recoded [*sic*] sound) is specifically prohibited by 28 C.F.R. § 543.13(e), which provides, "Staff may not subject visits between an attorney and an inmate to auditory supervision."

99. Recording the detainees' attorney visits was not necessary for the MDC's security purposes. It violated the law and interfered with the detainees' access to effective assistance of counsel. Through April 2002 or later, attorney visits were recorded with sound. Repeatedly throughout November and December, MDC staff brought to Hasty's attention the fact that "silent witness" cameras might be substituted for audio-ready cameras, but this advice was not heeded.

Policy to Deny Detainees Access to Consuls

100. The WITSEC designation and communications restrictions also made it difficult for consulates to contact detainees who were citizens of their countries.

101. Though non-citizen immigration detainees must be advised of their right to seek assistance from their consulates under Article 36 of the Vienna Convention on Consular Relations, Apr. 24, 1963, TIAS 6820, 21 U.S.T. 77, many Plaintiffs and class members were not advised of this right. Others were coerced into signing forms they did not understand, waiving that right. When the MDC Plaintiffs and class members sought to contact their consulates, their requests were repeatedly denied by the MDC Defendants.

102. For example, Hammouda was not informed that he had the right to have his consulate told about his detention until June 2002. At one point, he tried to call his consulate, but the number provided to him by MDC staff was incorrect. Abbasi was never informed of his right to call his consulate. While at the INS's Varick Street detention facility, he asked to speak to a lawyer or his consulate, but was not allowed to do so.

INHUMANE CONDITIONS OF CONFINEMENT AT MDC

103. Confinement in the ADMAX SHU subjected the MDC Plaintiffs and class members to a system of conditions designed to make their lives difficult and painful, not for any legitimate penological reason but in the belief that they were probably terrorists who therefore ought to suffer, and in the hopes that this suffering would lead to their cooperation with law enforcement. These conditions included confinement to bare cells virtually 24 hours a day; denial of recreation; deprivation of sleep; arbitrary strip-searches; chains, handcuffs and leg cuffs, coupled with twisting their hands and arms and stepping on their leg chains, whenever they left their cells; constant insult; denial of a chance to practice their religion; and lack of access to the prison handbooks that explained how to file complaints about such mistreatment.

Restraints and Abuse

104. During transport between the MDC Receiving and Discharge Area ("R&D Area") and the ADMAX SHU on the ninth floor of the MDC, 9/11 detainees at the MDC were fully restrained in metal handcuffs attached to a waist chain that was connected to another chain linked to ankle cuffs. Similarly, during routine escorts on the ADMAX SHU, the detainees were handcuffed behind their backs and their ankles were shackled. When they were escorted to visits, interviews, or out of the MDC, the detainees were handcuffed in front, restrained in a waist chain, and placed in leg restraints. The MDC Defendants subjected all MDC Plaintiffs and class members to such restraints routinely, as a matter of policy. In addition, MDC Defendants kept all MDC Plaintiffs and class members confined to their cells for

nearly 24 hours a day almost every day while they were housed in the ADMAX SHU.

105. Physical abuse of the MDC Plaintiffs and class members during transport was routine. Abuse was more flagrant before the MDC began videotaping detainee escorts in early October 2001, but continued even after that time, and included:

a. Slamming detainees against walls during escorts, including when they first arrived and on the way to attorney and doctor visits and recreation. Upon arrival to the MDC, staff slammed 9/11 detainees against the wall and pushed their faces into a t-shirt hanging on the wall which displayed the slogan "These Colors Don't Run" and the American flag.

b. Bending or twisting detainees' arms, hands, wrists, and fingers.

c. Lifting detainees off the ground by their arms, and pulling on their arms and handcuffs.

d. Stepping on detainees' leg restraint chains, both while stationary and while walking.

e. Using physical restraints as a form of punishment by leaving them in a cell in restraints for no proper penological purpose.

f. Handling detainees in various other rough and inappropriate manners.

106. Plaintiffs and class members were always fully compliant, making any use of force unnecessary and against BOP policy. Incidents of detainee misconduct were rare, and included only peeling paint off walls, injuring themselves, hiding from cameras, or refusing to come to the cell door to be handcuffed.

107. Numerous complaints about abuse of 9/11 detainees at MDC led the BOP to institute a policy of videotaping all 9/11 detainee movements and resulted in two OIG investigations, as well as investigations by the BOP Office of Internal Affairs and the FBI. Despite his awareness of these complaints and investigations, Hasty failed to investigate the abuse, punish the abusers, train his staff, or implement any process at MDC to review the tapes for abuse. Many of these tapes were destroyed, disappeared, or were taped over, and others were withheld from the OIG for years before they were "found" by MDC staff.

108. Typically, medical staff failed to examine or even comment on injuries the 9/11 detainees received from staff, or to ask how they occurred. MDC Plaintiffs and class members were never given an opportunity to speak to medical personnel outside the hearing of the correctional officers who abused them; these officers sat in on medical consults, and on occasion even assisted the doctors. It was the practice of the medical staff not to report abuse by correctional officers, and the MDC Plaintiffs and the class members often did not ask for doctors when they were abused for fear of retaliation by those officers.

109. MDC staff verbally abused Plaintiffs and class members by referring to them as "terrorists," and other offensive names; threatening them with violence; cursing at them; insulting their religion; and making humiliating sexual comments during strip-searches. These instances of abuse were themselves the result of Hasty labeling the detainees as "terrorists" in MDC memoranda despite the lack of any connection between class members and terrorist activity.

110. Some MDC Plaintiffs and class members complained about this abuse. For example, on February 11, 2002, Hammouda and several other class members complained to the MDC counselor that MDC staff called them "camel," gave them the finger, and assaulted them. No action was taken on these complaints. The counselor who reported the complaint to the Warden was ostracized and harassed.

Arbitrary and Abusive Strip-Searches

111. While Defendant Cuciti was given responsibility for developing the strip-search policy on the ADMAX, that policy was never put in writing, and the searches were conducted inconsistently.

112. 9/11 detainees were strip-searched upon arrival to MDC at the R&D Area and again after they had been escorted, in handcuffs and shackles and under continuous guard, to the ninth floor ADMAX SHU. Some of the same officers who were present for a detainee's strip-search in R&D were present for the detainee's strip-search on the ADMAX SHU. Detainees were strip-searched every time they were removed from or returned to their cell, including before and after meeting with a lawyer, receiving medical care, attending a court hearing within the MDC, or being transferred to another cell. These strip-searches occurred even when they had no conceivable opportunity to obtain contraband, such as before and after non-contact attorney visits which they had been escorted to and from while handcuffed and shackled and under continuous four-man guard, and before and after being transferred directly from one cell to another. For example, on October 25, 2001, Mehmood had an immigration hearing and a noncontact legal visit at MDC. Thus, he was strip-searched four times that day. Similarly, Benatta was strip-searched both before

and after an FBI interview, even though he was transported in full restraints by five MDC staff members from his locked cell to the bare FBI interview room and back without the opportunity to receive contraband. The strip-searches had no rational relation to any legitimate penological objective.

113. At other times 9/11 detainees were subjected to random strip-searches, despite remaining within their locked cells without opportunity to receive contraband. For example, MDC records indicate that Benatta was strip-searched on September 23, 24, and 26 of 2001, although he was not transported out of his cell on any of those days.

114. Many, though not all, of these illegal strip-searches were documented in a "visual search log" created by MDC staff for review by MDC management, including Hasty. Other illegal searches were captured on videotape.

115. Strip-searches were employed by MDC staff as punishment and used to humiliate the MDC Plaintiffs and class members, using such tactics as having female officers present, videotaping the strip-searches against BOP policy, strip-searching detainees unnecessarily and within view of other prisoners and staff, and making jokes and humiliating comments during strip-searches. On one occasion, a guard arrived in the middle of one of Benatta's strip-searches, and joked with the other guards about how they should have let him know Benatta was being searched, so he could have been there for all of it. Another time, a female officer watched Benatta's search. For Hammouda, the searches were so traumatizing and humiliating that they ruined the few visits he was able to have with his wife. He was searched before and after seeing her, and officers made derogatory statements

about his body and otherwise harassed him. Some of these searches were videotaped. The process made him feel damaged before talking to his wife, and rendered him anxious and depressed both before and after the visits. It was so bad that Hammouda considered telling his wife not to visit.

116. Many strip-searches conducted on the ADMAX SHU were filmed in their entirety and frequently showed the detainees naked, contrary to BOP regulations that required strip-searches to "be made in a manner designed to assure as much privacy to the inmate as practicable." One MDC videotape shows four officers escorting a 9/11 detainee into a recreation cell and ordering him to strip while the officers berate him for talking too much with other detainees and for encouraging them to go on a hunger strike. The detainee had just been taken from his cell, pat-searched, and then escorted into the recreation cell by the four officers. There was no correctional purpose or justification for this strip-search.

117. On another occasion, MDC staff were ordered to strip-search all 9/11 detainees without suspicion or any opportunity to receive contraband in order to check to see if they had shaven genitalia, based on the mistaken belief that Muslims shave their genitals prior to performing jihad. In fact, Muslims commonly shave their bodies for religious and hygienic reasons.

118. The strip-searches caused all of the MDC Plaintiffs and class members embarrassment and humiliation.

Sleep Deprivation

119. Until March 2002, bright lights were kept on in the cells of MDC Plaintiffs and class members 24 hours a day, depriving them of sleep. Prison rules forbade det-

ainees to cover their heads while lying in bed at night, so there was no escape from the constant light. In addition, officers banged loudly on their cell doors to wake them up, interrupt their prayers, or generally harass them; sometimes this noise-making took place during required inmate counts at midnight, three and five a.m., but on other occasions it was without this excuse.

120. MDC staff have defended much of the noise as a necessary byproduct of "bar taps," a safety procedure in which correctional personnel use a mallet to tap on each bar in the facility weekly to produce a noise and check for stress or damage. MDC documents show that contrary to past MDC practice, bar taps on the ADMAX unit were conducted twice a night, in the middle of the night. On some occasions, correctional officers walked by every 20 minutes throughout the night, kicked the doors to wake up the detainees, and yelled things such as, "Motherfuckers," "Assholes," and "Welcome to America." Officers would also watch the in-cell cameras and kick on the doors as soon as they thought a detainee was asleep.

121. All the MDC Plaintiffs and class members experienced sleep deprivation, causing substantial physical and emotional distress. They complained repeatedly to officers, MDC management, and medical personnel, yet received no relief. On one occasion, Hammouda complained that he couldn't sleep at night, and was given a sheet of paper advising him to avoid coffee.

De Facto Denial of Recreation; Inadequate Clothing and Exposure to the Elements

122. Until October 30, 2001 MDC Plaintiffs and class members were denied all recreation. After October 30,

Plaintiffs and class members were offered "recreation" in empty cages on the ADMAX range. The cages were devoid of any exercise equipment and open to the sky. Thus they were exposed to the elements, including rain and, in the winter, snow and freezing cold. The MDC Plaintiffs and class members were often offered transport to these recreation cells at the early hour of six or seven a.m., but denied any extra clothing besides their light cotton prison garb, and, during the dead of winter, a light jacket. Detainees who accepted these offers were often physically abused along the way by MDC officers who escorted them and were sometimes left for hours in the cold recreation cell, over their protests, as a form of punishment.

123. Thus, while "recreation" was nominally offered several times a week, the MDC Plaintiffs and class members were constructively denied exercise during the fall and winter months. For example, MDC records show that on November 8, 2001, only 13 of the 46 9/11 detainees who were offered recreation accepted recreation. Two days later, on November 10, 2001, 11 9/11 detainees initially requested recreation, but all but two of them changed their minds when the time came, based on the cold wind that was blowing through the unit. MDC records indicate that the entire range was so cold that day, the officers wore jackets inside. Recreation was offered again on November 13, but again, only two detainees accepted due to the cold.

124. Bajracharya, for example, almost always refused recreation. MDC records show that one of the few times he chose to visit the recreation cages was December 28, 2001 at 8:45 in morning. He was left out in the elements with only a thin coat until 11a.m., despite the fact that it was below freezing that day.

125. Khalifa was one of the few 9/11 detainees who frequently accepted recreation, despite the cold, because getting to breathe fresh air was the closest he could get to feeling free. His acceptance of recreation did not please the MDC guards, so they chose a cold day, and left him outside in the recreation cage in the freezing cold for four hours, with only a thin jacket. He knocked repeatedly at the door and asked the guards to get him, but they merely laughed at him. When he was finally brought back to his cell, he was shaking and could not feel his feet.

126. MDC staff documented Plaintiffs' and class members' consistent rejection of the opportunity for "recreation" in ADMAX SHU Reports created for review by MDC management, including Lopresti and Sherman. Despite receiving many complaints about the cold, Hasty decided not to issue warmer clothing to the 9/11 detainees, and decided that recreation would continue to be offered only in the chilly early morning.

127. Throughout the fall and winter, even the cells of the MDC Plaintiffs and class members were extremely cold. The MDC Plaintiffs were denied sweaters, jackets, other warm clothing, or bedding adequate to keep them warm. Throughout this period, MDC staff on the ADMAX unit frequently wore jackets while inside to keep warm.

Lack of Hygiene Items and Provision of Inadequate and Unhealthy Food

128. The MDC Plaintiffs and class members were deliberately denied adequate, healthy, and religiously appropriate food. Meals in the ADMAX SHU were meager and barely edible, leaving the MDC Plaintiffs hungry.

129. Contrary to the usual policy for inmates in administrative segregation, MDC Plaintiffs and class members were denied all access to the commissary, pursuant to a written MDC policy created by Cuciti and Lopresti, and approved by Sherman and Hasty. Nor were they allowed to retain anything, even an extra apple, in their cells.

130. MDC Plaintiffs and class members were also denied access to basic hygiene items like toilet paper, soap, towels, toothpaste, eating utensils, personal reading glasses, and a cup for drinking water, pursuant to a written MDC policy created by Cuciti and Lopresti, and approved by Sherman and Hasty. Under the policy, hygiene items were passed out and then retrieved daily. Thus for the first several months of their detention, the MDC Plaintiffs and class members were not allowed to keep toilet paper, a towel, soap, a toothbrush, a cup, or other personal hygiene items in their cells, making it difficult to maintain proper health and hygiene, contrary to religious dictates and personal dignity. This policy was created for the 9/11 detainees, and had never been imposed on inmates in administrative or disciplinary segregation at MDC before.

Deliberate Interference with Religious Rights

131. MDC and Passaic Plaintiffs and class members were consistently burdened in their attempts to practice and observe their Muslim faith.

132. Soon after their arrival at MDC, Plaintiffs requested copies of the Koran, but did not receive them until weeks or even months later, pursuant to a written MDC policy (created by Cuciti and Lopresti, and approved by Hasty and Sherman) that prohibited the 9/11 detainees from keeping anything, including a Koran,

in their cell. Abbasi recalls that it was weeks before he received a Koran, and Hammouda and Mehmood did not receive one until a month after they were each detained. Benatta requested a Koran during the first several weeks of his detention, and never received one.

133. While detained in the ADMAX SHU, MDC Plaintiffs and class members were all denied the Halal food required by their Muslim faith, despite many requests for a Halal diet. MDC Plaintiffs and class members often chose not to eat the main part of their meals because they could not identify the type of meat it contained. This exacerbated the hunger caused by their already meager meals, and as a result, they were hungry almost every day of their confinement at MDC. Mehmood brought his religion to the attention of MDC staff as early as November 30, 2001, yet he was not cleared for a Halal diet until February 26, 2002. Abbasi never received Halal food in the ADMAX.

134. There was no clock visible to the 9/11 detainees, and MDC staff refused to provide them the time of day so that they could pray at the proper times. The staff also refused to tell 9/11 detainees the date, making it difficult for them to know when Ramadan began.

135. MDC Plaintiffs and class members were sometimes disciplined for not responding to a prison count because they were in the midst of their prayers. Hammouda, for example, received an incident report for refusing to stand up for count. He filed a grievance over this report, explaining that he needed to finish his prayer, and stood up as soon as he was done. As a result of the incident, he was prohibited from social visits for sixty days.

136. MDC staff frequently interrupted MDC Plaintiffs' and class members' prayers by banging on cell doors, screaming derogatory anti-Muslim comments, videotaping, and telling them to "shut the fuck up" while they were trying to pray. Staff also mocked the detainees' prayer by attempting to repeat the Arabic phrases of the Azan (the call to prayer) loudly. One MDC guard frequently yelled "Jesus" whenever he heard the opening phrases of the Azan.

137. Evidence and complaints about these practices were brought to the attention of MDC management, including Hasty.

138. At Passaic, the policy to deny detainees the ability to practice their religion was implemented similarly. There too, guards disrupted prayer time by yelling and making noise. For example, guards would purposely wait until the detainees were praying to hand out razors and other hygiene supplies.

139. Detainees at Passaic were denied Halal food as well. For example, when Turkmen requested Halal food, the guard replied "This is not a hotel, this is a prison." The request was otherwise ignored.

Failure to Provide Handbooks

140. The usual channels for filing complaints of mistreatment were cut off at MDC. MDC handbooks which explained how to file complaints about mistreatment were not given to the MDC Plaintiffs and class members on a timely basis, if at all. Abbasi, for example, did not receive the MDC handbook until May of 2002. Some MDC Plaintiffs and class members, including Abbasi, received a short two-page explanation of policies at the ADMAX SHU, but that document did not include any information about making complaints, and was con-

fiscated by MDC staff shortly after it was provided. By putting them in the extremely isolated ADMAX SHU, imposing a communications blackout, and shutting down their ability to file complaints, MDC Defendants blocked MDC Plaintiffs' and class members' access to normal channels for lodging complaints of abuse and mistreatment.

ALLEGATIONS CONCERNING INDIVIDUAL PLAINTIFFS

Ahmer Iqbal Abbasi

141. Abbasi entered the United States in 1993 with a visitor visa, and subsequently sought political asylum from his native country of Pakistan. He remained in the United States unlawfully after that application was denied, only traveling one time in 1998 for a short trip to Pakistan. He drove a cab in Manhattan and saved up to purchase a small grocery store, which he sold prior to 2001.

142. Abbasi was arrested by the FBI on September 25, 2001. At the police station, he was interviewed at length by FBI, INS and NYPD officers. The officers asked Abbasi about his religious beliefs and practices.

143. Abbasi was not told why he was being arrested. He later learned that he came to the attention of the FBI because a house guest had presented a false social security card at the New Jersey Department of Motor Vehicles. The FBI became interested in Abbasi based only on the report that the card, and a passport, had been left by "a male possibly Arab" using Abbasi's address. Based on this information, and nothing more, Abbasi was held as "of interest" to the PENTTBOM investigation, and detained in maximum security confinement until cleared of any connection to terrorism.

144. On September 26, Abbasi was taken to the INS Varick Street detention center. He acknowledged that he had entered into a fraudulent marriage for the purpose of obtaining a green card, and stated that he would like to be deported. Abbasi was previously ordered removed and thus did not receive any immigration hearings. Abbasi could have been removed by the INS within weeks; instead, he was detained in harsh conditions at MDC to facilitate the FBI's investigation into whether he might have any ties to terrorism.

145. On the afternoon of September 27, 2001 Abbasi was transported to MDC by the INS "Special Response Team" in a convoy of INS and NYPD vehicles. The Special Response Team members wore full body armor with helmets and goggles. The convoy used sirens, and the streets were shut down. Once at MDC, Abbasi was placed in the ADMAX SHU.

146. The conditions of Abbasi's confinement were harsh. Like the other MDC Plaintiffs and class members, Abbasi was placed in the ADMAX SHU arbitrarily and without justification, subjected to a communications blackout, denied access to the outside world, counsel and to his consulate, arbitrarily and abusively strip-searched, and subjected to inhumane conditions of confinement including sleep deprivation, constructive denial of recreational activities and hygienic items, and deprivation of adequate food and medical attention. Abbasi was and remains a devout Muslim, and the MDC Defendants deliberately and substantially interfered with his religious practice. Abbasi was not provided with timely notice of MDC's complaint procedures.

147. Whenever Abbasi was removed from his cell, he was placed in handcuffs, chains, and shackles. Four or more MDC staff members typically escorted him to his

destination, frequently inflicting unnecessary pain along the way, for example, by tightening his handcuffs and shackles so much that he periodically lost feeling in his fingers and thumb. He was beaten upon arrival at MDC, and systematically shoved into the wall upon later transports. Despite the pain, Abbasi offered no resistance, fearing that resistance would only make matters worse. In early October, MDC staff began videorecording his transports, and the physical abuse lessened then to some degree. The guards were also verbally abusive, and referred to Abbasi and the other detainees as "fucking Muslims" and "terrorists."

148. These conditions were completely without penological justification, as no one at the FBI or the BOP had any reason to suspect that Abbasi was dangerous or connected to terrorism. The FBI never developed any evidence to tie Abbasi to any terrorist activity, or indicate that he might be dangerous. Indeed, the only reason Abbasi was ever suspected of a connection to terrorism was his identity as a Muslim from Pakistan.

149. On October 2, 2001, SIOC at FBI Headquarters sent an electronic communication to the New York field office requesting information about Abbasi and other detainees. SIOC instructed the New York office to state whether the FBI had an investigative interest in Abbasi, describe the basis for the initial interest, supply specific information justifying continued interest or non-interest, and provide supporting documentation. It does not appear that the New York field office provided any information in response to this request.

150. On October 15, 2001, Abbasi was interviewed at MDC by a team of INS, FBI, and NYPD officers. He was asked if he could provide information regarding September 11, and questioned about his immigration

status and his marriage. This was the last time Abbasi was questioned by the FBI. In January, he was interviewed again by the INS regarding his marriage. None of these interviews developed any information tying Abbasi to terrorism or indicating that he might be dangerous.

151. By November 1, 2001, Abbasi had been cleared by the New York field office of any connection to terrorism. On that day, SIOC requested CIA name traces on over one hundred detainees, including Abbasi, for whom the FBI had found no link to the September 11 terrorist attacks or any other terrorist activity, organization, or plans. FBI Headquarters indicated that these detainees would probably be released within seven days. Agents at the New York field office sent electronic communications to SIOC repeatedly over the next month, reminding them that Abbasi, along with dozens of others, had been cleared through their investigation, yet remained detained as "of interest" pending Headquarters' final decision.

152. Over three months later, on February 7, 2002, Stephen Jennings, Acting Chief of the International Terrorism Operations section of the FBI's Counterterrorism Division, told Michael Pearson, Executive Associate Commissioner of the INS, that, after consultation with FBI Headquarters, the FBI had no investigative interest in Abbasi in connection to the PENTTBOM investigation. Mr. Jennings said that Abbasi could thus be removed from the INS's custody list. Abbasi was moved from the ADMAX SHU to the general population at MDC on February 14, 2002.

153. On February 26, 2002, Abassi was charged with three criminal offenses, including fraudulent marriage, falsification of a social security card, and credit card

fraud. He pled guilty to these offenses in June of 2002, and was sentenced to time served. He was deported on August 20, 2002.

154. Abbasi continues to suffer the emotional and psychological effects of his detention in the United States.

Anser Mehmood

155. Anser Mehmood was born in Lahore, Pakistan on January 12, 1960. He moved from Pakistan to the United States with his wife, Uzma, and three children in 1989. Uzma is Abbasi's sister. Mehmood entered the United States on a business visa and stayed after that visa expired. The family lived in Bayonne, New Jersey, and Mehmood's fourth child was born there in 2000. In May of 2001, Uzma's brother—a United States citizen—submitted an immigration petition for the entire family.

156. Mehmood used the money he made selling his successful business in Pakistan to start a trucking business which he operated on contract with a freight moving company based in Ohio. He was successful and saved enough money to purchase a house in New Jersey and send money home to his family in Pakistan. His children attended public school and adjusted well to life in the United States.

157. On the morning of October 3, 2001, Mehmood was asleep with his wife and year-old son. A team of FBI and INS agents knocked on his door. The agents searched their home and questioned Mehmood and his wife about their immigration status and their relatives, and showed them pictures of individuals who they did not recognize. The agents also asked him whether he was involved with a jihad. Mehmood acknowledged that he

had overstayed his visa, and showed the agents the social security number he was using to work.

158. Mehmood's arrest was a still more remote result of the FBI investigation of the lead that led to Abbasi's arrest—that "a male possibly Arab" left a fake social security card and passport at the New Jersey DMV. While investigating Abbasi, the FBI found the name of his sister Uzma. They came to the house to speak to her, not Mehmood.

159. The FBI told Mehmood they had no interest in him, but that they had to arrest Uzma, as they were interested in learning information from her about another brother, still living in Pakistan. Mehmood convinced the FBI to arrest him instead of Uzma, who was still breastfeeding their infant. The agent told Mehmood that they had no choice but to arrest one of the parents, but that Mehmood faced a minor immigration violation only, and he would be out on bail within days.

160. Mehmood was handcuffed and placed in a car with several INS officers, who transported him to the INS Varick Street detention center, where he was placed in a cell with several other Pakistani and Arab men who had also overstayed their visas. Later that day, he was placed in handcuffs and shackles and put in a van with three other men, flanked on either side by FBI vehicles, which blocked off the side roads as they drove to the Metropolitan Detention Center.

161. Mehmood was charged with overstaying his visa. On October 25, 2001 he was denied bond and political asylum. On December 5, 2001 he was ordered removed. He appealed, but this appeal was subsequently withdrawn. Throughout this period, he was detained in

harsh conditions at MDC to facilitate the FBI's investigation into whether he might have any ties to terrorism.

162. Mehmood's time in the ADMAX SHU at MDC was harsh. His abuse began the moment he entered MDC on October 4, 2001. He was dragged from the van by several large corrections officers, who threw him into several walls on his way into the facility. His left hand was broken during this incident and remained swollen for some time afterward. He later learned that he sustained neurological damage in his hand and hearing loss. Mehmood was photographed, and then re-photographed after MDC guards cleaned the blood from his mouth. The guards threatened to kill him if he asked any questions. One asked if he knew why he was at MDC. He responded that he was there for overstaying his visa. The guard disagreed, and said he was there for the attack on the World Trade Center.

163. Mehmood was then transported in handcuffs and shackles to the ADMAX SHU, and placed in a cell with a man named Ashraf.

164. The family's neighbors learned that Mehmood had been arrested through media reports, and began harassing the family. Mehmood's children were isolated and taunted at school. Uzma could not support the family without his financial contribution, and eventually, in February of 2002, Uzma and the children were forced to return to Pakistan.

165. The conditions of Mehmood's confinement were harsh. Like most if not all of the other MDC Plaintiffs and class members, Mehmood was placed in the ADMAX SHU arbitrarily and without justification, subjected to a communications blackout, denied access to counsel and to his consulate, arbitrarily and abusively strip-searched,

and subjected to inhumane conditions of confinement including sleep deprivation, constructive denial of recreational activities and hygienic items, and deprivation of adequate food and medical attention. Mehmood was and remains a devout Muslim, and the MDC Defendants deliberately and substantially interfered with his religious practice. Mehmood was not provided with timely notice of MDC's complaint procedures.

166. Whenever Mehmood was removed from his cell, he was placed in handcuffs, chains, and shackles. Four or more MDC staff members typically escorted him to his destination, frequently inflicting unnecessary pain along the way, for example, by banging him into the wall, dragging him, carrying him, and stepping on his shackles and pushing his face into the wall. They were also verbally abusive, and stated that Mehmood was responsible for 9/11, so they would do to him what he did on that day. He also witnessed correctional officers make ethnic and religious slurs to other 9/11 detainees.

167. These conditions were without any penological justification, as no one at the FBI or the BOP had any reason to suspect Mehmood of connection to terrorism or posing a danger. The FBI never developed any evidence to tie Mehmood to any terrorist activity or indicate that he might be dangerous. Indeed, the only reason Mehmood was ever suspected of a connection to terrorism was his identity as a Muslim from Pakistan.

168. Mehmood was never interviewed by the INS or the FBI after his arrest. According to FBI documents, Mehmood was of interest because he refused to accept a "lucrative transportation assignment" on September 11, 2001. However, by November or December of 2001, the FBI agent investigating Mehmood had determined that his refusal was ordered by the trucking company he did

contract work for, due to the turmoil following September 11, and that Mehmood should be deported. On November 1, 2001, Mueller requested CIA name traces on dozens of detainees, including Mehmood, for whom the FBI had found no link to the September 11 terrorist attacks or any other terrorist activity, organization, or plans. Mueller indicated that the detainees would probably be released within seven days.

169. Despite these indications, a December 17, 2001 list of FBI interest detainees maintained at FBI headquarters stated that Mehmood was "of interest" to the FBI. Mehmood's clearance at FBI Headquarters was "pending" by January 16, and finalized by January 30, 2002.

170. On February 6, 2002 Mehmood was moved to the general population in MDC. He was told that he would be deported shortly. It appears from FBI documents that this action was not based on Mehmood's clearance, but rather on a motion by his attorney to have him moved out of segregation. On March 29, 2002 he was charged with working with an unauthorized social security number. He pled guilty and was sentenced to eight months in prison. On April 4, 2002 he was transferred to Passaic County Jail, in New Jersey. He was deported to Pakistan on May 10, 2002.

171. Mehmood continues to suffer the emotional and psychological effects of his detention in the United States. Mehmood lost his home and business due to his detention, and has had trouble finding work in Pakistan.

Benamar Benatta

172. Benamar Benatta, a citizen of Algeria, initially entered the United States on a nonimmigrant visitor visa on December 31, 2000. Benatta was then a member of

the Algerian Air Force, and came to the United States to receive aviation training at a Northrop Grumman training facility. Benatta completed that training program, but remained in the United States past the expiration of his visa with the goal of seeking political asylum and gaining employment in this country. On September 5, 2001 he crossed the Canadian border with false documentation and applied for refugee status.

173. Benatta was detained by Canadian authorities for investigation. The day after the September 11 attacks, Canadian authorities alerted authorities in the United States to Benatta's profile and presence in Canada and transported him, against his will, back to the United States, where he was taken into custody by the INS. Benatta was detained for several days at the Rainbow Bridge port of entry in Niagara Falls, New York, where he was interrogated by the FBI regarding his false identification. A detailed summary of this interview was sent by electronic communication to SIOC, along with copies of investigatory notes by Canadian and US immigration officials and photocopies of the documents taken off Benatta.

174. The INS immediately commenced removal proceedings against Benatta based on his visa overstay and transferred him to Batavia Federal Detention Facility (BFDF). At BFDF, Benatta was served with a Notice to Appear at the Immigration Court in Batavia, New York on September 25, 2001. However, on September 16, 2001, before Benatta could retain or confer with counsel, he was transported to MDC in Brooklyn.

175. Benatta was transferred to MDC on a private jet, without explanation. He was one of the first detainees in the brand new ADMAX SHU, and thus there were no others to explain to him what was

happening. He was placed in the ADMAX SHU with nothing—no toilet paper, toothpaste, a toothbrush, or shoes. To protest his conditions he went on a seven day hunger strike. He began eating again after MDC staff told him he would be force fed, and described how they would stick a tube down his throat.

176. The conditions of Benatta's confinement were harsh. Like most or all of the other MDC Plaintiffs and class members, Benatta was placed in the ADMAX SHU arbitrarily and without justification, subjected to a communications blackout, denied access to counsel and to his consulate, arbitrarily and abusively strip-searched, and subjected to inhumane conditions of confinement including sleep deprivation, constructive denial of recreational activities and hygienic items, and deprivation of adequate food and medical attention. Benatta was and remains a devout Muslim, and the MDC Defendants deliberately and substantially interfered with his religious practice. Benatta was not provided with timely notice of MDC's complaint procedures.

177. Whenever Benatta was removed from his cell, he was placed in handcuffs, chains, and shackles. Four or more MDC staff members typically escorted him to his destination, frequently inflicting unnecessary pain along the way, for example, by deliberately kicking Benatta's manacles and shackles into his lower body. Despite the pain, Benatta offered no resistance, fearing that resistance would only make matters worse.

178. Benatta's only consistent access to the outside world was the view from one small window. Even that was taken away when MDC officials painted over the window, to further punish Benatta and the other detainees. On April 6, 2002, Benatta received an incident report for attempting to scrape the frosting of his cell

window so he could see the outside world. After that incident report, MDC guards ordered Benatta to apologize to them, and retaliated against him by taken [*sic*] his blanket at night. The guards did this several times, and also once punished Benatta by taking his dinner.

179. Benatta's detention in harsh conditions had a profoundly deleterious impact on his health. Twice, Benatta attempted to injure himself due to his distress over the inexplicable, prolonged, and arbitrary confinement.

180. On October 6, 2001, Benatta's cellmate was removed for a medical emergency. Benatta was transferred to a recreation cage and was observed there banging his head into the concrete wall. MDC staff did nothing to stop him, nor did they seek psychological treatment for Benatta after this incident.

181. The lights were left on in his cell for 24 hours a day and guards banged on the walls and made loud noises in the night to keep him from sleeping. When Benatta tried to cover his face with a blanket to sleep, the guards ordered him to remove it. Benatta was unable to sleep for days at a time due to this abuse. On November 27, 2001 Benatta was left out in a recreation cage for two hours. The temperature that morning was in the 40s, and it was cloudy. When he was brought back inside, he requested a visit from the staff psychologist for sleep deprivation. After speaking to Benatta for five minutes through the door of his cell, the psychologist stated that Benatta was fine, and left.

182. The next day, November 28, 2001, Benatta asked to speak to the psychologist again. One hour later, one of the guards observed Benatta looking out his cell door

window and refusing to respond to the guard's statements. Twenty minutes after that Benatta's cellmate, Khalifa, sounded his distress alarm to alert the guards that Benatta was attempting to hurt himself by banging his head against the bars of his cell. Benatta does not remember what he was thinking, or whether he was trying to kill himself. He just snapped. The next thing he knew, several MDC guards entered his cell, jumped him, threw him to the floor and began beating and kicking him. Benatta believes that it was during this incident that he chipped his tooth. He was forcibly extracted from his cell by MDC guards and carried to a solitary strip cell, where he was tied tightly to a metal bed, without a mattress, and left for over four hours on suicide watch. He was subsequently released from four-point restraints and placed in ambulatory restraints for another two hours. At no point on that day nor afterwards was he removed from the unit for psychological treatment or a physical examination. From that day forward, Benatta was kept in a cell alone.

183. Benatta had several immigration hearings at MDC. On December 12, 2001, an INS attorney gave the immigration judge a document from the FBI's Counterterrorism Unit in Washington, which stated that Benatta was "of interest" to the FBI. The judge ordered him removed to Canada or, in the alternative, to Algeria. Although Benatta would have accepted removal to Canada, he appealed his removal order because the FBI officers who interrogated him threatened to have him put on a military jet and sent to Algeria, where Benatta feared execution. Benatta did not have the assistance of counsel in writing his appeal, or access to any assistance or law books. He did not even have use of a pen for

longer than ten minutes. That appeal was dismissed on April 8, 2002.

184. Benatta's conditions of confinement were without any penological justification, as no one at the FBI or the BOP had any reason to suspect Benatta of connection to terrorism or posing a danger. The FBI never developed any evidence to tie Benatta to any terrorist activity or indicate that he might be dangerous. Indeed, the only reason Benatta was ever suspected of a connection to terrorism was his identity as a Muslim from Algeria.

185. Benatta was interrogated by the FBI several times during his detention at MDC. He was questioned about his religious practices and beliefs, his citizenship, and his Algerian Air Force employment. On September 29, 2001, information about Benatta, gleaned from an FBI interview at MDC on September 23, 2001, along with other interviews and investigation, was sent to SIOC from the New York FBI field office.

186. On October 1 and 2, 2001 SIOC sent electronic communications to the New York field office requesting information about Benatta and other detainees. As with Abbasi, SIOC instructed the New York field office to state whether the FBI had an investigative interest in Benatta, describe the basis for the initial interest, supply specific information justifying continued interest or non-interest, and provide supporting documentation.

187. The New York field office did not respond with any affirmative statement of interest or any information regarding Benatta's potential ties to terrorism. Despite this, at some point in late 2001 Benatta was identified as "of special interest" by the Joint Terrorism Task Force, and one summary of the FBI's investigation into Benatta

includes information from an MDC intelligence memo indicating that Benatta is suspected of ties to terrorist organizations. There is no indication of what this alleged suspicion was based upon, nor any supporting details. As early as November 2, 2001, the FBI agent assigned to Benatta's case determined that he was of no interest to the PENTTBOM investigation.

188. On November 5, 2001 the New York Field office indicated their investigation was complete by submitting Benatta's name to SIOC for FBI Headquarters to request a CIA name trace and officially clear him. Benatta was officially cleared of any connection to terrorism at FBI Headquarters on November 14, 2001. Both the FBI's New York field office and SIOC were aware that Benatta was not of interest to the PENTTBOM investigation, and information about Benatta's clearance was also available to officials in the Bureau of Prisons, and at the MDC. Despite this, until April 30, 2002 when he was transferred to general population, he remained in extremely restrictive conditions in the ADMAX SHU.

189. On May 3, 2002 SIOC sent another electronic communication to the New York field office again requesting information about whether the FBI had an interest in Benatta. The New York Field office responded on May 15, 2002 that they had no investigative interest in Benatta.

190. On December 12, 2001 Benatta was indicted in the Western District of New York for possession of a false social security card and a false alien registration receipt card. Despite a magistrate judge's order to "arrest Mr. Benatta, and bring him forthwith to the nearest Magistrate Judge" to answer the indictment,

Benatta was not arraigned, nor brought before any magistrate, until April 30, 2002.

191. On September 12, 2003 United States Magistrate Judge Schroeder recommended dismissal of both of the counts against Benatta, holding that Benatta's detention in MDC was criminal in nature, and violated his Sixth Amendment right to a speedy trial. See *United States* v. *Benatta*, No. 01-CR-247E, 2003 U.S. Dist. LEXIS 16514 (W.D.N.Y. Sept. 12, 2003). Judge Schroeder determined Benatta was in criminal detention because of his transfer from INS custody, against INS procedures, and without immigration justification, as well as his assignment of a United States Marshall Service number, his extremely restrictive conditions of confinement, and his repeated interrogations by the FBI. Judge Schroeder described Benatta's detention as a "subterfuge" and "sham," created to hide the reality that, because Benatta was an "Algerian citizen and a member of the Algerian Air Force, [he] was spirited off to the MDC Brooklyn ... and held in the SH[U] as 'high security' for the purposes of providing an expeditious means of having [him] interrogated by special agents of the FBI ...." *Id.* at 25. The judge held that Benatta was "primarily under the control and custody of the FBI" from September 16, 2001 until April 2002, and that accepting the United States' claim that Benatta "was being detained by the INS during that period of time, for the purpose of conducting removal proceedings would be to join in the charade that has been perpetrated." *Id.* at 30.

192. Benatta remained in the United States in immigration detention while he continued to seek political asylum. He was transferred to Canadian custody in 2006 and sought refuge [*sic*] status there. He was

granted refugee status from Canada in 2007, and his application for permanent resident status is currently pending.

193. Benatta continues to suffer the emotional and psychological effects of his seven and a half month detention in the ADMAX SHU. He has been diagnosed with post-traumatic stress disorder and has seen a therapist and tried different medications periodically since his release. He has trouble concentrating and writing, and is pessimistic about his chances in school or in a career. He is isolated from family and friends and has trouble communicating and trusting others. He has been unable to get a job, in part because no one will hire him after learning about his time in detention.

Ahmed Khalifa

194. Ahmed Khalifa entered the United States on July 16, 2001 on a student visa. Khalifa had completed five years of a six year program toward a medical degree at the University of Alexandria in Egypt. He planned to return to Egypt to complete the degree, and had a return ticket to Egypt for October 15, 2001. While in the United States, he worked for approximately six weeks at a clothing store. After that, he started working at a deli. He worked at both places without authorization.

195. Khalifa came to the attention of the FBI after the husband of a postal service worker reported a tip to the FBI hotline stating that several Arabs who lived at Khalifa's address were renting a post-office box, and possibly sending out large quantities of money.

196. On September 30, 2001, Khalifa was home at the apartment he shared in Brooklyn with several Egyptian friends when there was a knock on the door. He opened the door to find over ten FBI, INS and NYPD officers.

One FBI agent asked Khalifa for identification, and Khalifa showed him his international travelers/student ID. The officers searched his wallet, and appeared to be very interested in a list of phone numbers of friends in Egypt.

197. The officers searched the apartment without consent. One FBI agent asked Khalifa about his roommates by name. They asked for his passport, and asked if he had anything to do with September 11. One of the FBI agents told Khalifa that they were only interested in three of the roommates, but another agent interrupted, and said they also needed Khalifa. An FBI agent asked an INS agent to arrest Khalifa for working without authorization. He was then handcuffed, and placed in a vehicle. They drove to the work places of Khalifa's other two roommates, who were not at home during the sweep, and arrested them as well.

198. Khalifa and the others were taken to the INS Varick Street detention facility, where they filled out some paperwork and were told they would be released after 24 hours. They were told not to contact their embassy otherwise it would mean trouble for them.

199. Khalifa was charged with working without authorization. On November 13, 2001, he was ordered removed from the United States. On that day, he waived his right to appeal the removal order because he thought accepting deportation would be the fastest way to get out of MDC. Khalifa could have been removed within days; instead he was detained in harsh conditions at MDC to facilitate the FBI's investigation into whether he might have any ties to terrorism.

200. Khalifa was transported to MDC on October 1, 2001. The five roommates were all chained together by

officers in combat gear and escorted in armored convoy to MDC. When the convoy passed by Ground Zero, one officer stated, "See what you've done."

201. Khalifa was processed at the ground floor of MDC. One employee took his glasses. He did not receive another pair for 90 days. He was slammed into the wall, pushed and kicked by MDC officers and placed into a wet cell, with a mattress on the floor. Khalifa's wrists were cut and bruised from his handcuffs, and he was worried about other detainees, whom he heard gasping and moaning through the walls of his cell.

202. Khalifa was interviewed by the FBI and the INS on October 7, 2001 at MDC. One of the FBI officers noticed the bruises on Khalifa's wrists and apologized. When Mr. Khalifa told them he was being abused by MDC guards, they stated it was because he was Muslim. The agents questioned him about whether he knew Sheikh Omar Abdel-Rahman, and whether Khalifa was religious. They asked him how frequently he prayed and what mosques he visited in Egypt. This was his only interview with the FBI. In their notes of the interview, the FBI agents did not express any doubt as to Kahlifa's credibility, any suspicion of ties to terrorism, nor any interest in him in connection to the PENTBBOM investigation.

203. After the interview, Khalifa was strip-searched by MDC guards, who recorded the search with a video camera and laughed when they made him bend over and spread his buttocks.

204. The conditions of Khalifa's confinement were harsh. Like most or all of the other MDC Plaintiffs and class members, Khalifa was placed in the ADMAX SHU arbitrarily and without justification, subjected to a

communications blackout, denied access to counsel and to his consulate, arbitrarily and abusively strip-searched, and subjected to inhumane conditions of confinement including sleep deprivation, constructive denial of recreational activities and hygienic items, and deprivation of adequate food and medical attention. Khalifa was and remains a devout Muslim, and the MDC Defendants deliberately and substantially interfered with his religious practice. Khalifa was not provided with timely notice of MDC's complaint procedures.

205. Whenever Khalifa was removed from his cell, he was placed in handcuffs, chains, and shackles. Four or more MDC staff members typically escorted him to his destination, frequently inflicting unnecessary pain along the way, for example, by deliberately over-tightening his cuffs and twisting his fingers and wrists. They tried to conceal this abuse from the cameras. Despite the pain, Khalifa offered no resistance, fearing that resistance would only make matters worse. Guards on the night-shift smoked on the range and blew smoke into Khalifa's cell.

206. Toward the end of November, Khalifa was placed into a cell with Benamar Benatta. Benatta had a lot of trouble sleeping because of the cell lights and the guards making noises throughout the night. At one point, Benatta had not slept for four nights straight and tried to complain to the guards about it. Khalifa heard Benatta ask for them to turn off the lights, or for sleeping pills or even just something to read. No one responded. One night, Khalifa awoke in the middle of the night to find that Benatta had taken a plastic spoon and cut himself on his hand. The next morning, Benatta began slamming his head into the wall. Khalifa tried to stop

him, but Benatta pushed him away, so Khalifa pushed the distress button in his cell to call the guards.

207. The guards burst into the cell and removed Khalifa, who was crying over worry about Benatta. They lifted Benatta up and slammed him into the wall as they removed him from the cell. Khalifa did not see Benatta again.

208. Benatta's breakdown coincided with the fourth day of Khalifa's hunger strike. He was refusing to eat until the MDC guards allowed him to call the Egyptian consulate. After Benatta was removed from his cell, one MDC guard told Khalifa that Benatta was refusing to eat until Khalifa began to eat too. To help Benatta, Khalifa started eating again, despite his continued lack of consular access.

209. Khalifa made many requests of the guards: for shoes, books, and medical care, and for clothing to cover himself because female guards were present, and therefore saw him naked, during clothing exchange. None of these requests was granted.

210. Khalifa's conditions of confinement were completely without penological justification, as the FBI never developed any evidence to connect Khalifa to terrorism, and no one at the FBI or the BOP had any reason to suspect Khalifa of posing a danger. The only reason Khalifa was ever suspected of a connection to terrorism was his identity as a Muslim from Egypt.

211. By November 5, 2001, the New York office of the FBI had completed its clearance investigation of Khalifa, and sent his name to SIOC, at FBI headquarters, to be sent out for a CIA name trace. Agents at the New York field office sent electronic communications to SIOC repeatedly over the next month, reminding them

that Khalifa, along with dozens of others, had been cleared through their investigation, yet remained detained as "of interest" pending Headquarters' final decision. Khalifa's clearance was "pending" at FBI headquarters as early as November 14, 2001, yet Khalifa was held in limbo for months longer. A list of "of interest" detainees maintained at FBI headquarters dated December 17, 2001 states that the FBI had no interest in Khalifa, and that a clearance letter by Maxwell had been signed, but not sent. Khalifa was not officially cleared until December 19, 2001. He was not deported nor released from the ADMAX SHU until mid-January.

212. Khalifa was deported on January 13, 2002. It was the middle of the winter, but the MDC guards brought him to JFK airport wearing only pants and a t-shirt. Khalifa asked for a coat, and they refused.

213. Khalifa was seriously affected by his detention and abuse. He sought treatment for depression upon return to Egypt, and continues to suffer to this day. Among other symptoms, he has trouble concentrating, and has found his medical study difficult. These issues have negatively affected his career in medicine and his ability to enjoy life.

Saeed Hammouda

214. Saeed Hammouda lawfully entered the United States on August 31, 1999 on a business visa. He subsequently changed his status to a student visa and began studying to receive an MBA in marketing. He married a United States citizen with whom he had a prior relationship in March 7, 2001, and she petitioned for him to change his status to a lawful permanent resident.

215. On October 7, 2001, Hammouda was temporarily staying at the Manhattan apartment of a friend, Nabil Abdullah, when five or six FBI and INS agents arrived at his door. Hammouda allowed the agents to search the apartment. The FBI treated his friend's things as if they were Hammouda's and seized several items that belonged to Hammouda's friend including a computer, flight manuals, and an ice making machine.

216. The agents told Hammouda they were interested in him because he was not in the United States lawfully. The agents asked him if he was religious, what mosques he attended, and whether he prayed every Friday. Hammouda gave them his social security card and identification card. He was sick and preparing to take medicine, which they would not allow him to do. The INS agents asked him questions about his wife and his marriage. This lasted for several hours.

217. A week later, on October 14, 2001, FBI and INS agents returned to the apartment. One INS officer told Hammouda he was present in the country illegally and arrested him. Hammouda was transported to the INS Varick Street detention center and charged with violating his visa by working without authorization. When he was eventually brought before an immigration judge ("IJ"), an INS officer opposed his bond and the IJ denied bond. He was also brought for immigration hearings on November 14, 2001 and December 5, 2001. On February 15, 2002 he received a final removal order, which he did not appeal. The INS could have removed Hammouda within weeks, instead his deportation was delayed while he was detained in harsh conditions at MDC to facilitate the FBI's investigation into whether he might have any ties to terrorism.

218. After processing at the Varick Street detention center, Hammouda was placed in a convoy of vehicles and transported to the MDC. He was processed on the ground floor of the MDC and his glasses were taken from him. During his transport and processing, Hammouda was verbally and physically abused and called derogatory names. He was pressed against the wall several times, and sometimes his face hit the wall. He was strip-searched three times, and called names such as "terrorist" and "Arabic asshole." He was then transported to the ADMAX SHU, where he was detained for eight months.

219. In January 2002, Hammouda was interrogated for four or five hours by two FBI agents and an INS officer. He was interrogated several times, and was administered a polygraph test. These interrogations and the polygraph test caused distress and anxiety.

220. The conditions of Hammouda's confinement were harsh. Like most or all of the other MDC Plaintiffs and class members, Hammouda was placed in the ADMAX SHU arbitrarily and without justification, subjected to a communications blackout, denied access to counsel and to his consulate, arbitrarily and abusively strip-searched, and subjected to inhumane conditions of confinement including sleep deprivation, constructive denial of recreational activities and hygienic items, and deprivation of adequate food and medical attention. Hammouda was and remains a devout Muslim, and the MDC Defendants deliberately and substantially interfered with his religious practice. Hammouda was not provided with timely notice of MDC's complaint procedures.

221. Whenever Hammouda was removed from his cell, he was placed in handcuffs, chains, and shackles.

Four or more MDC staff members typically escorted him to his destination, frequently inflicting unnecessary pain along the way, for example, by deliberately overtightening his cuffs and twisting his fingers and wrists. They tried to conceal this abuse from the cameras. Despite the pain, Hammouda offered no resistance, fearing that resistance would only make matters worse.

222. Officers routinely used profanity and called Hammouda derogatory names. One officer threw hygiene supplies at the detainees during the materials' distribution. Other officers made sexual comments about Hammouda's wife. Hammouda complained to various MDC supervisors about this abuse.

223. In the winter months the SHU was very cold at night. Mr. Hammouda could not sleep because of the lights and the temperature. On some nights, Mr. Hammouda paced his small cell to become fatigued and induce sleep.

224. Hammouda's conditions of confinement were without any penological justification, as no one at the FBI or the BOP had any reason to suspect Hammouda of connection to terrorism or posing a danger. The FBI never developed any evidence to connect Hammouda to terrorism, or to cause concern that he might be dangerous. The only reason Hammouda was ever suspected of a connection to terrorism was his identity as a Muslim from Egypt.

225. As early as October, Hammouda's INS file indicated that he was not of interest. And on November 5, 2001 the New York Field office indicated their investigation was complete by submitting Hammouda's name to SIOC so that FBI Headquarters could request a CIA name trace and officially clear him. Headquarters

had apparently already received this clearance through another source, because on November 1, 2001, SIOC requested CIA name traces on over one hundred detainees, including Hammouda, for whom the FBI had found no link to the September 11 terrorist attacks or any other terrorist activity, organization, or plans. Headquarters indicated that the detainees would probably be released within seven days.

226. Agents at the New York field office sent electronic communications to SIOC repeatedly over the next month, reminding them that Hammouda, along with dozens of others, had been cleared through their investigation, yet remained detained as "of interest" pending Headquarters' final decision. However, as of December 17, 2001, FBI Headquarters listed Hammouda as "of interest." Hammouda was officially cleared by FBI Headquarters on January 17, 2002, yet he was not removed from the ADMAX. Inexplicably, on May 3, 2002 SIOC sent an electronic communication to the New York field office again requesting information about whether the FBI had an interest in Hammouda. The New York field office responded on May 15, 2002 that now they did have an investigative interest in Hammouda.

227. Despite having been cleared of any connection to terrorism in January, Hammouda was detained in the ADMAX until he was deported on June 14, 2002.

228. Hammouda continues to suffer the emotional and psychological effects of his detention in the United States. He felt like a stranger to his own family when he was released from custody. For almost eight months after his release, he did not work and remained at home. Even today, he has problems in open areas and prefers to be in little or no light. He is fearful of any travel outside Egypt.

Purna Raj Bajracharya

229. Bajracharya entered the United States in 1996 on a three-month B1 business visa. He overstayed that visa to remain in Queens, New York for five years. He worked at various odd jobs, including at a Queens Pizzeria and a flower Shop in Manhattan, and sent money home to his wife and sons in his native Nepal.

230. Bajracharya planned to return to his home, Katmandu, in fall or winter 2001. In anticipation of that return, he used his video-camera to record the New York streets he had grown to know, so that he could show them to his wife and children. Bajracharya came to the attention of the FBI on October 25, 2001, when a Queens County District Attorney's Office employee observed an "arab male" videotaping outside a Queens' office building that contained the Queens County District Attorney Office and a New York FBI office. Investigators from the Queens D.A. office approached Bajracharya, and asked him why he was taking pictures. Bajracharya, who speaks little English, tried to explain that he was a tourist. He was taken inside the building, searched, and interrogated. At some during the five hour long interview, FBI and INS agents arrived and took part.

231. Upon the agents' request, Bajracharya brought the FBI and INS to his apartment in Woodside and provided them with his passport and various identification documents. He acknowledged that he had overstayed his visa and was in the United States unlawfully.

232. Bajracharya was then placed under arrest by the INS. FBI Agent Wynne, who was assigned to investigate Bajracharya further, indicated to the INS that he would follow up with a telephone call the next day

regarding whether or not the FBI had interest in Bajracharya.

233. An INS form I-213 dated October 26, 2001 indicates that FBI interest in Bajracharya was "undetermined" and the case was assigned to FBI Agent Wynne. That day, however, the FBI special agent in charge of the New York Joint Terrorism Task Force told the INS that Bajracharya was "of active investigative interest to the FBI" based on the videotaping. Thus, the INS district director recommended that Bajracharya be detained in MDC. A second I-213 was issued, indicating that the FBI had "special interest" in Bajracharya. The following day, October 27, the Custody Review Unit at INS headquarters in DC approved Bajracharya's transfer to MDC.

234. Bajracharya was transported to MDC on October 27, 2001. He recalls being pushed forcibly when he was brought out of the van and seeing a T-shirt on the wall with a picture of an American flag on it. He was taken to the ADMAX SHU and placed in a cell alone. He remained alone for the next two months.

235. Bajracharya was interviewed at MDC, this time with the assistance of an interpreter, by FBI Agent Wynne and other law enforcement personnel on October 30, 2001. Bajracharya provided the agents with information about his time in the United States, his employment history and his finances, and explained that he was videotaping the building in question as a tourist. Bajracharya was asked whether he was Muslim or knew any Muslims. A Buddhist, Bajracharya explained that he was not Muslim, knew no Muslims, and loved the United States but was planning to return to Nepal to be with his family. In his notes regarding the interview, Wynne did not express any doubt as to Bajracharya's credibility, any

suspicion of ties to terrorism, nor any interest in him in connection to the PENTTBOM investigation.

236. Two days later, after corroborating various aspects of Bajracharya's statements, FBI Agent Wynne issued an FBI report clearing Bajracharya of any connection to terrorism and informed him that he could expect the matter to be resolved within a week or so. That weekend, Wynne received pleading phone calls from Bajracharya's sons, who had learned of their father's arrest from his roommate in Queens.

237. By November 5, 2001, the New York office of the FBI had completed its clearance investigation of Bajracharya and sent his name to SIOC, at FBI headquarters, to be sent out for a CIA name trace. Agents at the New York field office sent electronic communications to SIOC repeatedly over the next month, reminding them that Bajracharya, along with dozens of others, had been cleared through their investigation, yet remained detained as "of interest" pending Headquarters' final decision. Other FBI documents, including a list of interest detainees maintained in FBI headquarters, indicate that the FBI had closed its investigation and concluded they had no interest in Bajracharya by mid-November 2001. Despite all these clearances, Bajracharya was held at MDC in the ADMAX SHU until he was deported on January 13, 2001.

238. Throughout Bajrachareya's confinement, Agent Wynne spoke to counterterrorism officials in the United States Attorney's Office and within the INS, seeking to understand why the detainee he had affirmatively cleared of any connection to terrorism was still in the ADMAX SHU at MDC. After becoming frustrated with his inability to achieve official clearance for Bajracharya,

Wynne called The Legal Aid Society, and advised an attorney there, Olivia Cassin, that Bajracharya needed representation.

239. The conditions of Bajracharya's confinement were harsh. Like most or all of the other MDC Plaintiffs and class members, Bajracharya was placed in the ADMAX SHU arbitrarily and without justification, subjected to a communications blackout, denied access to counsel and to his consulate, arbitrarily and abusively strip-searched, and subjected to inhumane conditions of confinement including sleep deprivation, constructive denial of recreational activities and hygienic items, and deprivation of adequate food and medical attention. Bajracharya was not provided with timely notice of MDC's complaint procedures.

240. Bajracharya is a small man—approximately 5'3", and, at the time of his arrest, about 130 pounds. Whenever Bajracharya was removed from his cell, he was placed in handcuffs, chains, and shackles. Four or more MDC staff members typically escorted him to his destination. Bajracharya offered no resistance, fearing that resistance would only make matters worse.

241. Bajracharya could not sleep due to the light in his cell. He was so traumatized by his experience at MDC that he began weeping constantly. He thought he was going crazy, and several times indicated to MDC personnel that he was feeling suicidal. He recalls screaming to guards that he was going to die. Indeed, Cassin asked an MDC doctor to transfer Bajracharya to general population, and the doctor responded that Bajracharya was crying too much, and would cause a riot. Guards on the ADMAX scolded Bajracharya for crying, and called him and the other detainees foul names.

242. Bajracharya's conditions of confinement were completely without penological justification, as the FBI never developed any evidence to connect Bajracharya to terrorism, and the FBI officer in charge of investigating Bajracharya affirmatively found that he posed no danger as early as November 1, 2001. No one at the FBI or the BOP had any reason to suspect Bajracharya of posing a danger. The only reason Bajracharya was ever suspected of a connection to terrorism was his "Arab" appearance.

243. Bajracharya was charged with a section 237(a)(1)(B) overstay. He attended an immigration hearing at MDC on November 1, 2001 and another on November 19, 2001, during which the immigration attorney assigned to his case sought and received a continuance, as FBI clearance to release Bajracharya had not yet been received from Washington, DC. Bajracharya did not have counsel present at that hearing. Ms. Cassin was first able to meet with Bajracharya at MDC for his next immigration hearing on December 6, at which the government acknowledged that Bajracharya had been cleared by the FBI and agreed to voluntary departure. Based on the immigration judge's instructions, Cassin bought Bajracharya an airplane ticket to Katmandu through a deportation officer, but that departure date was cancelled without explanation.

244. Bajracharya was deported to Nepal on January 13, 2002. Cassin and Wynne brought a suit to MDC and provided it to an assistant warden there so that Bajracharya would, at least, have clothing to fly home in. Instead, he was taken to a plane in an orange jumpsuit and shackles. Bajracharya's treatment at the ADMAX SHU profoundly affected him, and continues to affect him. Since his release, he has felt introverted, is quicker

to anger, and is less inclined to leave his home and visit with friends. He has trouble sleeping, and feels as though he has lost himself.

Ibrahim Turkmen

245. Ibrahim Turkmen entered the United States through New York City on a tourist visa in early October 2000 to visit an old friend from Turkey who lived on Long Island.

246. In late October 2000, Turkmen, at his friend's suggestion, found work at a service station in Bellport, Long Island. He worked there several days a week until mid-January 2001, when he took a job at another service station in the same town. In mid-April 2001, he began working part-time for a locally-based Turkish construction company.

247. From his arrival in the United States until he was taken into INS custody, Turkmen frequently called his wife and four daughters back in Turkey. While dearly missing them, he decided to remain in the United States to provide for their support. Each week, Turkmen sent most of his meager earnings home to his family.

248. Turkmen spoke almost no English when he came to the United States. While here, he learned barely enough English words to conduct his limited daily business. At the time that he was taken into custody, Turkmen understood very little spoken English, and he could not read English at all.

249. At about 2:30 p.m. on October 13, 2001, slightly more than a month after the September 11 terrorist attacks, two FBI agents visited Turkmen at the apartment where he was staying with several Turkish friends in West Babylon, New York. Without advising him of his right to counsel, they asked Turkmen whether

he had any involvement in the September 11 terrorist attacks and whether he had any association with terrorists. They also inquired as to his immigration status, among other things.

250. Turkmen had great difficulty understanding the FBI agents' questions given his limited knowledge of English and the lack of an interpreter. All the same, he did his best to answer truthfully. He denied any involvement with terrorists, terrorist organizations, or terrorist activity. The FBI agents, nonetheless, accused Turkmen of being an associate of Osama bin Laden, placed him under arrest, confiscated his personal items (passport, identification, credit cards, etc.) and money, and searched his home without his consent. Turkmen was fully interviewed on October 13, 2001 and no information was uncovered to connect him to the terrorism investigation.

251. Turkmen came to the attention of the FBI when his landlord called the FBI hotline to report that she rented an apartment in her home to several Middle Eastern men, and she "would feel awful if her tenants were involved in terrorism and she didn't call." The FBI knew that her only basis for suspecting these men was that they were Middle Eastern; indeed, she reported that they were good tenants, and paid their rent on time.

252. Turkmen was taken to an INS facility in Nassau County, fingerprinted, and further interrogated, this time by an INS official. Once again, he was not advised of his right to counsel. Due to his limited knowledge of English and the lack of an interpreter, Turkmen again had great difficulty understanding the questions. Still, he did his best to answer them truthfully. Turkmen again denied any involvement with terrorists, terrorist organizations, or terrorist activity, and requested a

hearing before an immigration judge to determine whether he could remain in the United States. He was held at the Nassau County INS facility for five or six hours.

253. That evening, at approximately 11:30 p.m., Turkmen was brought to another INS facility in Manhattan, where INS officials asked him still more questions in English. Despite great difficulty understanding the questions, and without the aid of an interpreter, Turkmen again did his best to answer them truthfully. For the third time, he denied any involvement with terrorists, terrorist organizations, or terrorist activity.

254. Turkmen's interrogators then instructed him to sign various immigration papers which he could not read because they were in English. Afraid that he would only make matters worse for himself if he refused to comply, Turkmen reluctantly signed the papers.

255. Early the next morning, October 14, 2001, Turkmen was taken to the Passaic County Jail in Paterson, New Jersey, where he remained confined, except for a single trip to Immigration Court in Newark, New Jersey, until February 25, 2002, a period of nearly four and one-half months.

256. Shortly after arriving at the Passaic County Jail, Turkmen received a Notice to Appear from the INS, charging him with overstaying his visa and scheduling a hearing at Immigration Court in Newark, New Jersey on October 31, 2001. On the same date, he received a Notice of Custody Determination and requested a re-determination of the custody decision by an immigration judge.

257. On October 29, 2001, two FBI agents visited Turkmen at the Passaic County Jail. They asked him still more questions about his immigration status, his reasons for entering the United States, his work experience, his religious beliefs, and other personal matters. Another Turkish 9/11 detainee fluent in English translated the questions for Turkmen, who answered them all truthfully. For the fourth time, he denied any involvement with terrorists, terrorist organizations, or terrorist activities.

258. Two days later, on October 31, 2001, Turkmen was taken to Immigration Court in Newark, New Jersey, where he appeared pro se before an Immigration Judge. Once again, he was not advised of his right to counsel. While an interpreter was present, the interpreter was not of Turkish descent and was fluent in neither Turkish nor English. After conceding that he had overstayed his tourist visa, Turkmen accepted a voluntary departure order requiring him to leave the United States by November 30, 2001. He declined to request bond because the judge assured him that he would be allowed to return to Turkey within a matter of days. The INS never appealed the voluntary departure order issued to Turkmen.

259. When he returned to the Passaic County Jail later that day, Turkmen called a friend to ask him to purchase a plane ticket for Turkmen's return to Turkey. Two days later, on November 2, 2001, Turkmen's friend brought the ticket to the INS offices in Newark, New Jersey. Turkmen remained, nonetheless, in the Passaic County Jail for nearly four more months, until February 25, 2002. The INS prevented his compliance with the Immigration Judge's voluntary departure order and

thereby caused an automatic entry of an order of removal with a future bar on reentry for 10 years.

260. While confined in the Passaic County Jail, Turkmen was not allowed to call his wife and four daughters back home in Turkey. He learned through a friend, however, that his wife had been hospitalized for a month with an undisclosed ailment so serious that she lost most of her hair and teeth. Upon learning this, Turkmen was beside himself with worry. Unable even to call his seriously ailing wife, he suffered extreme emotional distress.

261. While confined in the Passaic County Jail, Turkmen was deliberately denied the ability to observe the mandatory practices of his religion, for example, by regularly interrupting his daily prayers and refusing to serve him Halal food.

262. On November 1, 2001, Mueller sent an electronic communication requesting CIA name traces on dozens of detainees, including Turkmen, for whom the FBI had found no link to the September 11 terrorist attacks or any other terrorist activity, organization, or plans. Mueller indicated that the detainees would probably be released within seven days. Turkmen was detained for months longer. A November 16, 2001 memo from the regional director of the INS indicated that the FBI's interest in Turkmen was "unknown."

263. On January 14, 2002, more than three months after he was taken into custody and more than two and one-half months after he received a voluntary departure order, the Assistant Special Agent in Charge of the New York FBI indicated to the INS that Turkmen had been cleared on any connection to terrorism. A few days later, on January 17, 2002, Turkmen was visited by an INS

agent. The agent informed Turkmen that he had been "cleared" by the FBI but still needed to be "cleared" by the INS. When Turkmen asked how long the latter "clearance" might take, the agent replied that he did not know. On January 31, the INS acknowledged that Turkmen was not of interest to the FBI and thus removed him from the INS custody list, thereby clearing him to be deported.

264. On February 17, 2002, Turkmen was visited by another INS agent, who told Turkmen that he had received INS "clearance" and would be allowed to depart the United States within the next two weeks. Eight days later, on February 25, 2002, INS agents took Turkmen in handcuffs from the Passaic County Jail to Newark Airport, where they put him on a plane to Istanbul, Turkey, without a single penny or lira in his pocket. Although Turkmen requested the return of $52 confiscated from him at the time of his arrest—money that he needed to pay for, among other things, the eight-hour bus trip from Istanbul Airport to his home in the City of Konya—that request was denied.

265. As soon as Turkmen debarked from the plane at Istanbul Airport, he was met by a Turkish police officer, who escorted him to a nearby police station, where he was interrogated for about an hour concerning his four-and-one-half month detention in the United States. Once again, Turkmen denied any involvement with terrorists, terrorist organizations, or terrorist activity. After the interrogation concluded, he was allowed to leave for Konya, though he still had no money to buy the bus ticket. Only the kindness of a complete stranger who lent the necessary funds permitted Turkmen to return home.

266. Turkmen was again interrogated at length concerning his detention in the United States, this time

by Konya's Security Intelligence Division, following the filing of this lawsuit on April 17, 2002. At the close of the interrogation, the Division's Superintendent told him to "be careful." Approximately 10 days later, Turkmen's father was contacted by the Head of Gendarmerie in Konya's Karapinar District, Turkmen's birthplace, to ascertain Turkmen's current address, ostensibly to "give to the human rights organizations that are trying to reach Turkmen." Several days later, the Head of Gendarmerie in Konya's Cumra District asked Turkmen's former employer for Turkmen's personnel file. After reviewing the file, that gendarme took with him all the documents relating to Turkmen's 16 years of public service.

267. The presumption of guilt thus follows Turkmen even after his deportation from the United States, despite the fact that he has never been involved in terrorist activity and the complete absence of any evidence of his involvement in such activity. Because of this presumption, Turkmen is deemed a "security risk" and is thus unable to return to his prior government position.

268. Turkmen continues to suffer the emotional and psychological effects of his four and one-half months detention in the United States. He regularly experiences nightmares about his detention, making it difficult for him to sleep.

Akhil Sachdeva

269. Plaintiff Akhil Sachdeva is a native of India and a landed resident in Canada. In late September or early October 2001, Sachdeva returned to the United States from Canada to finalize his divorce from his wife and collect his personal belongings for his move back to

Canada. Sometime in late November 2001, an FBI agent visited the gas station owned by Sachdeva's ex-wife in Port Washington, New York, looking for a Muslim employee. Not finding that individual, the agent left a message for Sachdeva's ex-wife to contact the agent. She, in turn, asked Sachdeva to do so.

270. Sachdeva came to the attention of the FBI when a New York City fireman called the FBI hotline and reported that he had overheard two gas station employees "of Arab descent" having a conversation in Arabic and English, and the English included some discussion of flight simulators and flying.

271. In early December 2001, Sachdeva called the FBI agent, who asked Sachdeva to come to the agent's offices for an interview. Sachdeva agreed to do so. On December 9, 2001, Sachdeva met with two FBI agents at 26 Federal Plaza in Manhattan. They proceeded to question him at length about the September 11 terrorist attacks and his religious beliefs, among other things, though without advising him of his right to counsel or his right to remain silent. At the close of the interrogation, the agents examined Sachdeva's personal identification before allowing him to leave.

272. Sachdeva continued to close out his affairs in the United States in anticipation of his move back to Canada. In the early morning of December 20, 2001, while at his uncle's apartment, Sachdeva was arrested by INS agents. He was taken to the INS offices at 26 Federal Plaza, where he was interrogated for five hours about his ties to the September 11 terrorist attacks. At the close of the interrogation, INS agents confiscated all of Sachdeva's personal identification. He was then taken to Passaic County Jail. A memorandum from the interview of Sachdeva on December 20, 2001, the day of his arrest,

indicates that the FBI had no further interest in Sachdeva related to the PENTTBOM investigation. Because no one asserted an investigative interest in Sachdeva, the New York INS office indicated to INS headquarters that FBI interest in Sachdeva was "undetermined." The FBI did not officially clear Sachdeva until January 30, 2002, over a month later.

273. On December 27, 2001, while confined in Passaic County Jail, Sachdeva received a Notice to Appear, charging him with illegal re-entry. (He had overstayed a prior voluntary departure order.) Sachdeva had a hearing on December 31, 2001, in Immigration Court in Newark, New Jersey. He was not given any extra clothing for the trip, despite the extreme cold. The immigration judge told Sachdeva that he would be deported to Canada or India "within 30 days." The INS did not appeal that final deportation order. A February 14, 2002 INS document lists Sachdeva as "ready to remove." Even though the INS could have effectuated Sachdeva's removal from the United States within a matter of days, Sachdeva was detained for another three and one-half months, until April 17, 2002.

274. On April 17, 2002, INS agents took Sachdeva, in old clothes, from Passaic County Jail to Newark Airport, putting him on a plane to Canada, though without his personal identification or any money. Prior to his deportation, Sachdeva requested the return of these items. His requests were denied.

275. Sachdeva continues to suffer the effects of his detention in the United States long after his deportation. Upon his return to Canada, Canadian immigration officials suspended his landed immigrant status, taking away Sachdeva's work papers. The presumption of guilt thus continued to attach to Sachdeva after his depor-

tation from the United States, despite the fact that he has never been engaged in terrorist activity and the complete absence of any evidence that he has been engaged in such activity.

FIRST CLAIM FOR RELIEF

Fifth Amendment: Due Process—Conditions of Confinement

276. Plaintiffs incorporate by reference each and every allegation contained in the preceding paragraphs as if set forth fully herein.

277. MDC Plaintiffs bring this claim on their own behalf and on behalf of the class against all Defendants.

278. By adopting, promulgating, and implementing the policy and practice under which MDC Plaintiffs and class members were unreasonably detained and subjected to outrageous, excessive, cruel, inhumane, punitive and degrading conditions of confinement, Defendants, acting under color of law and their authority as federal officers, intentionally or recklessly deprived MDC Plaintiffs and class members of their liberty interests without due process of law in violation of the Fifth Amendment to the United States Constitution.

279. As a result of Defendants' unlawful conduct, MDC Plaintiffs and class members have suffered physical and psychological injury, emotional distress, humiliation, embarrassment, and monetary damages.

SECOND CLAIM FOR RELIEF

Fifth Amendment: Equal Protection—Conditions of Confinement

280. Plaintiffs incorporate by reference each and every allegation contained in the preceding paragraphs as if set forth fully herein.

281. Plaintiffs bring this claim on their own behalf and on behalf of the class against all Defendants.

282. In subjecting Plaintiffs and class members to harsh treatment not accorded similarly-situated non-citizens, Defendants, acting under color of law and their authority as federal officers, singled out Plaintiffs and class members based on their race, religion, and/or ethnic or national origin, and intentionally violated their rights to equal protection of the law under the Fifth Amendment to the United States Constitution.

283. As a result of Defendants' unlawful conduct, Plaintiffs and class members have suffered physical and psychological injury, emotional distress, humiliation, embarrassment, and monetary damages.

THIRD CLAIM FOR RELIEF

First Amendment: Free Exercise of Religion

284. Plaintiffs incorporate by reference each and every allegation contained in the preceding paragraphs as if set forth fully herein.

285. Plaintiffs Ibrahim Turkmen, Ahmer Iqbal Abbasi, Anser Mehmood, Benamar Benatta, Ahmed Khalifa, and Saeed Hammouda bring this claim on their own behalf and on behalf of the class against all Defendants.

286. Defendants adopted, promulgated, and implemented policies and practices intended to deny Plaintiffs and class members the ability to practice and observe their religion. These policies and practices have included, among other things, the visitation of verbal and physical abuse upon Plaintiffs and class members, and the deliberate denial of all means by which they could maintain their religious practices, including access to Halal food and daily prayer requirements. By such mis-

treatment, Defendants, acting under color of law and their authority as federal officers, have intentionally or recklessly violated Plaintiffs' and class members' right to free exercise of religion guaranteed to them under the First Amendment to the United States Constitution.

287. As a result of Defendants' unlawful conduct, Plaintiffs and class members have suffered psychological injury, emotional distress, humiliation, embarrassment, and monetary damages.

FOURTH CLAIM FOR RELIEF

First Amendment: Communications Blackout and Interference with Counsel

288. Plaintiffs incorporate by reference each and every allegation contained in the preceding paragraphs as if set forth fully herein.

289. MDC Plaintiffs bring this claim on their own behalf and on behalf of the class against all Defendants.

290. By adopting, promulgating, and implementing the policy and practice under which MDC Plaintiffs and class members were subjected to a "communications blackout" and other measures while in detention that interfered with their access to family, lawyers and the courts, Defendants intentionally or recklessly violated MDC Plaintiffs' rights to obtain access to legal counsel and to petition the courts for redress of their grievances, in violation of their rights under the First Amendment of the United States Constitution.

291. As a result of Defendants' unlawful conduct, MDC Plaintiffs and class members have suffered psychological injury, emotional distress, humiliation, embarrassment, and monetary damages.

FIFTH CLAIM FOR RELIEF

Fifth Amendment: Due Process—Blackout and Interference with Counsel

292. Plaintiffs incorporate by reference each and every allegation contained in the preceding paragraphs as if set forth fully herein.

293. MDC Plaintiffs bring this claim on their own behalf and on behalf of the class against all Defendants.

294. By adopting, promulgating, and implementing the policy and practice under which Plaintiffs and class members were subjected to a "communications blackout" and other measures while in INS detention that interfered with their access to family, lawyers and the courts, Defendants intentionally or recklessly violated MDC Plaintiffs' rights to obtain access to legal counsel and to petition the courts for redress of their grievances, in violation of their rights under the Due Process Clause of the Fifth Amendment to the United States Constitution.

295. MDC Plaintiffs and class members have no effective means of enforcing their Fifth Amendment rights other than by seeking declaratory and other relief from the Court.

296. As a result of Defendants' unlawful conduct, MDC Plaintiffs and class members have suffered psychological injury, emotional distress, humiliation, embarrassment, and monetary damages.

SIXTH CLAIM FOR RELIEF

Fourth and Fifth Amendments: Excessive, Unreasonable, and Deliberately Humiliating and Punitive Strip-Searches

297. Plaintiffs incorporate by reference each and every allegation contained in the preceding paragraphs as if set forth fully herein.

298. The MDC Plaintiffs bring this claim on their own behalf and on behalf of the class against all MDC Defendants.

299. By subjecting MDC Plaintiffs and class members to excessive and unreasonable strip-searches with no rational relation to a legitimate penological purpose when Defendants had no reasonable suspicion or rational reason to justify a strip-search, and conducting the searches in a deliberately humiliating manner that was not reasonably related to any legitimate penological purpose, MDC Defendants intentionally or recklessly violated MDC Plaintiffs' and class members' rights to privacy and to be free from unreasonable searches, in violation of their rights under the Fourth Amendment to the United States Constitution.

300. MDC Defendants were grossly negligent and/or deliberately indifferent in their supervision of MDC staff who subjected MDC Plaintiffs and class members to these excessive and punitive strip-searches and thereby violated MDC Plaintiffs' and the plaintiff class's rights under the Fourth Amendment to the United States Constitution.

301. By creating and approving the policy and practice under which MDC Plaintiffs and class members were subjected to these punitive strip-searches MDC Defendants intentionally or recklessly violated MDC

Plaintiffs' and class members' right to be free from punishment under the Due Process Clause of the Fifth Amendment to the United States Constitution.

302. As a result of Defendants' unlawful conduct, MDC Plaintiffs and class members have suffered psychological injury, emotional distress, humiliation, embarrassment, and monetary damages.

SEVENTH CLAIM FOR RELIEF

(42 U.S.C. § 1985: Conspiracy To Violate Civil Rights)

303. Plaintiffs incorporate by reference each and every allegation contained in the preceding paragraphs as if set forth fully herein.

304. Plaintiffs bring this claim on their own behalf and on behalf of the class against all Defendants.

305. Defendants Ashcroft, Mueller, Ziglar, Hasty, Zenk, Sherman, Lopresti and Cuciti, by agreeing to implement a policy and practice whereby Plaintiffs were harassed, physically and verbally abused, subjected to harsh and punitive conditions of confinement, subjected to routine and unreasonable strip-searches, burdened in their exercise of their religious beliefs, denied adequate recreation, nutrition, access to counsel and communication with the outside world because of their race, religion, ethnicity and national origin, conspired to deprive Plaintiffs of the equal protection of the law and of equal privileges and immunities of the laws of the United States, resulting in injury to Plaintiffs' person and property, in violation of 42 U.S.C. § 1985(3).

306. As a result of Defendants' unlawful conduct Plaintiffs suffered physical injury and emotional distress and are accordingly entitled to compensatory damages against all Defendants.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs and class members respectfully request that the Court enter a class-wide judgment:

1. Certifying this suit as a class action;

2. Awarding compensatory and punitive damages to Plaintiffs and class members for the constitutional violations they suffered in an amount that is fair, just, reasonable, and in conformity with the evidence;

3. Awarding Plaintiffs attorney's fees and costs pursuant to 42 U.S.C. § 1988; and

4. Ordering such further relief as the Court considers just and proper.

Dated: New York, New York
September 13, 2010

Respectfully submitted,
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APPENDIX F
U.S. DEPARTMENT OF JUSTICE
OFFICE OF THE INSPECTOR GENERAL

THE SEPTEMBER 11 DETAINEES:
A REVIEW OF THE TREATMENT OF ALIENS HELD ON IMMIGRATION CHARGES IN CONNECTION WITH THE INVESTIGATION OF THE SEPTEMBER 11 ATTACKS

April 2003

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CHAPTER ONE
INTRODUCTION

I. BACKGROUND

On September 11, 2001, terrorists hijacked four airplanes and flew two of them into the World Trade Center Towers in New York City and one into the Pentagon in Arlington, Virginia. The fourth plane crashed into a field in southwestern Pennsylvania before it could strike a target in Washington, D.C. The attacks killed more than 3,100 people, including all 246 people aboard the 4 airplanes.

The Federal Bureau of Investigation (FBI) immediately initiated a massive investigation, called "PENTTBOM," into this coordinated terrorist attack. The FBI investigation focused on identifying the terrorists who hijacked the airplanes and anyone who aided their efforts. In addition, the FBI worked with other federal, state, and local law enforcement agencies to prevent follow-up attacks in this country and against U.S. interests abroad.

Shortly after the attacks, the Attorney General directed the FBI and other federal law enforcement personnel to use "every available law enforcement tool" to arrest persons who "participate in, or lend support to,

terrorist activities."[1] One of the principal responses by law enforcement authorities after the September 11 attacks was to use the federal immigration laws to detain aliens suspected of having possible ties to terrorism. Within 2 months of the attacks, law enforcement authorities had detained, at least for questioning, more than 1,200 citizens and aliens nationwide.[2] Many of these individuals were questioned and subsequently released without being charged with a criminal or immigration offense. Many others, however, were arrested and detained for violating federal immigration law.

Our review determined that the Immigration and Naturalization Service (INS) detained 762 aliens as a result of the PENTTBOM investigation. Of these 762 aliens, 24 were in INS custody on immigration violations prior to the September 11 attacks. The remaining 738 aliens were arrested between September 11, 2001, and August 6, 2002, as a direct result of the FBI's PENTTBOM investigation. All 762 detainees were placed on what became known as an "INS Custody List"

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[1] Memorandum from Attorney General John Ashcroft to United States Attorneys entitled "Anti-Terrorism Plan" (September 17, 2001).

[2] In the weeks and months following the attacks, various totals of the number of people arrested in connection with the September 11 investigation were released by the Department of Justice or appeared in media accounts. A senior official in the Department's Office of Public Affairs told the Office of the Inspector General that in the weeks after the terrorist attacks her office provided frequent updates to the media on the number of persons questioned, arrested, and detained by federal, state, and local law enforcement officials. According to this official, the Public Affairs Office stopped reporting the cumulative totals after the number reached approximately 1,200, because the statistics became confusing.

because of the FBI's assessment that they may have had a connection to the September 11 attacks or terrorism in general, or because the FBI was unable, at least initially, to determine whether they were connected to terrorism.

The Government held these aliens in a variety of federal, local, and private detention facilities across the United States while the FBI investigated them for ties to the September 11 attacks or terrorism in general. These facilities included several Federal Bureau of Prisons (BOP) institutions such as the Metropolitan Detention Center in Brooklyn, New York; the Federal Detention Center in Oakdale, Louisiana; and the U.S. Penitentiary in Leavenworth, Kansas; INS facilities such as the Krome Service Processing Center in Miami, Florida; and state and local facilities under contract with the INS to house federal immigration detainees, such as the Passaic County Jail in Paterson, New Jersey, and the Hudson County Correctional Center in Kearny, New Jersey.

Soon after these detentions began, the media began to report allegations of mistreatment of the detainees. For example, detainees and their attorneys alleged that the detainees were not informed of the charges against them for extended periods of time; were not permitted contact with attorneys, their families, and embassy officials; remained in detention even though they had no involvement in terrorism; or were physically abused, verbally abused, and mistreated in other ways while detained.

Several individual detainees and non-profit organizations filed lawsuits against the Department of Justice (Department) protesting the lack of public information about the detainees and the length and conditions of the detainees' confinement. For example, the Center for National Security Studies brought suit against the Department under the Freedom of Information Act seeking in-

formation about the detainees, including their names and where they were being held.[3] Five detainees filed a class action lawsuit alleging they were physically abused, verbally abused, and held without a legitimate immigration or law enforcement purpose long after they received final removal or voluntary departure orders.[4] In addition, advocacy organizations such as Amnesty International and the Lawyers Committee for Human Rights issued reports asserting mistreatment of the detainees or mishandling of their cases.[5]

Pursuant to our responsibilities under the USA PATRIOT Act (Patriot Act) and the Inspector General Act, the Department of Justice Office of the Inspector General (OIG) initiated this review to examine the treatment of detainees arrested in connection with the Department's September 11 terrorism investigation.[6] Specifically, the OIG's review focused on:

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[3] *Center for National Security Studies* v. *United States Department of Justice*, 01-civ-2500 (D.D.C. filed December 6, 2002).

[4] *Turkmen* v. *Ashcroft*, 02-civ-2307 (E.D.N.Y. filed April 17, 2002).

[5] See, *e.g.*, "Presumption of Guilt: Human Rights Abuses of Post-September 11 Detainees," Human Rights Watch (August 2002); "A Year of Loss: Reexamining Civil Liberties Since September 11," Lawyers Committee for Human Rights (September 5, 2002).

[6] Pub. L. No. 107-56 (2001). The USA PATRIOT Act was signed by the President on October 26, 2001, approximately six weeks after the September 11 terrorist attacks. The Patriot Act provides new or enhanced law enforcement authorities, including the sharing of foreign intelligence information, increased penalties for money laundering and other financial crimes, and stricter controls on immigration. In addition, Section 1001 of the Patriot Act directs the OIG to receive and review claims of civil rights or civil liberties violations by Department employees.

- Issues affecting the length of the detainees' confinement, including the process undertaken by the FBI and others to clear individual detainees of a connection to the September 11 attacks or terrorism in general;
- Bond determinations for detainees;
- The removal process and the timing of removal; and
- Conditions of confinement experienced by detainees, including their access to legal counsel.

We focused our review on INS detainees housed at two facilities—the BOP's Metropolitan Detention Center (MDC) in Brooklyn and the Passaic County Jail (Passaic) in Paterson, New Jersey. We chose these two facilities because they held the majority of September 11 detainees and were the focus of many complaints about detainee mistreatment.

Our review did not seek to examine all aspects of the Department's terrorism investigation, including the specific investigative techniques involved in the September 11 investigation or the decisions made by federal, state, and local law enforcement on why to detain specific individuals.[7] Additional issues beyond the scope of this re-

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[7] Some constitutional arguments have been raised regarding the Department's treatment of September 11 detainees. The claims were made in a variety of contexts, some of which are inapplicable in the immigration context and some of which are beyond the scope of this report. Removal proceedings are matters of civil rather than criminal law. See *INS* v. *Lopez-Mendoza*, 468 U.S. 1032, 1039 (1984). Because they are not criminal proceedings, some constitutional protections that apply in the context of a criminal prosecution do not apply in a removal proceeding. For example, immigration detainees have no Sixth Amendment right to counsel. While they are permitted to

view include the reasons and justifications for the Department's decision to limit public release of information concerning arrests related to the ongoing terrorism investigation, its decision to close immigration proceedings to the public, and its use of voluntary interviews for certain categories of aliens.[8] Several lawsuits related to these issues are ongoing. In addition, our review did not examine the Department's use of material witness warrants to detain certain individuals in connection with its terrorism investigation, another issue currently being litigated in the courts.[9]

Rather, our review focused on the treatment of aliens who were held on federal immigration charges in connection with the September 11 investigation. We examined the reasons why many of the detainees experienced prolonged confinement. In addition, we examined the detainees' conditions of confinement, including their access to counsel, access to medical care, and allegations of physical or verbal abuse by correctional officers.

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be represented by an attorney, they must find and pay for the attorney themselves, unlike in criminal cases where the Government provides defendants with an attorney if they are unable to pay for counsel.

[8] For example, on November 9, 2001, the Department and the FBI sought voluntary interviews with approximately 5,000 male visitors or foreign nationals between the ages of 18 and 33 who had entered the United States after January 2000 from countries "where there have been strong al Qaeda presences." See Attorney General John Ashcroft, Press Conference (March 20, 2002).

[9] A material witness warrant can be obtained from a judge upon a showing that the testimony of a person is material to a criminal proceeding and that it may become impracticable to secure the presence of the person by subpoena. See 18 U.S.C. §3144. A person held on such a warrant is referred to as a "material witness." See *United States* v. *Awadallah*, 202 F. Supp. 2d. 55 (S.D.N.Y. 2002).

In this report, we discuss the actions of senior managers at the Department, the FBI, the INS, and the BOP, who established the broad policies and led the investigation in response to the September 11 attacks; the actions of the INS, which processed and detained many of the aliens arrested in the aftermath of September 11; and the actions of the BOP, which housed many of the detainees.

In conducting our review, we were mindful of the circumstances confronting the Department and the country as a result of the September 11 attacks, including the massive disruptions they caused. The Department was faced with monumental challenges, and Department employees worked tirelessly and with enormous dedication over an extended period to meet these challenges. It is also important to note that nearly all of the 762 aliens we examined violated immigration laws, either by overstaying their visas, by entering the country illegally, or some other immigration violation.

II. Methodology Of This Review

The OIG conducted interviews, fieldwork, and analysis for this review from March 2002 until March 2003. As noted above, we focused on two detention facilities, the MDC in Brooklyn, New York, and the Passaic County Jail in Paterson, New Jersey. We chose the MDC because it housed 84 aliens arrested in the aftermath of the September 11 terrorist attacks. In addition, the MDC received widespread media coverage for allegations of abuse against detainees and for the restrictive conditions of confinement it imposed on the detainees. We selected Passaic because it housed 400 aliens arrested in connection with the September 11 terrorism investigation—the most in any single facility—and, like the MDC, was the subject of many media articles regarding the treatment of detainees.

In this review, "September 11 detainees" are defined as aliens held on immigration violations in connection with the investigation of the September 11 attacks. The FBI categorized these aliens as either "of interest," "of high interest," or "of undetermined interest" to its terrorism investigation. The INS treated all three categories as "September 11 detainees," and sometimes referred to them as "special interest" or "of interest" detainees.[10]

As noted above, the Department detained 762 aliens on immigration charges in connection with its terrorism investigation between September 2001 and August 2002. From the total of 475 September 11 detainees held at the MDC and Passaic,[11] we selected a sample of 119 detainees—53 held at the MDC and 66 confined at Passaic—to examine their detention experiences in detail.

Our MDC sample of 53 detainees was composed of 19 aliens who were being held at the facility during our site visit in May 2002; a random sample of 30 detainees previously held at the MDC but released or transferred prior to our May 2002 visit; and 4 detainees whose experiences at the MDC were the subject of media articles.

Our Passaic sample of 66 detainees was composed of 30 aliens reportedly held at the facility immediately prior to our site visit in May 2002; a random sample of 30 detainees held at Passaic but released or transferred prior

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[10] In this report we generally refer to all three FBI categories collectively as "of interest," unless otherwise noted.

[11] Nine September 11 detainees were held at both Passaic and the MDC.

to our May 2002 visit; and 6 detainees whose detentions at Passaic were the subject of media articles.[12]

We interviewed 32 detainees in these sample groups—19 housed at the MDC, 13 at Passaic—with their attorneys present if they requested. We also separately interviewed seven immigration attorneys who represented September 11 detainees held at the MDC or Passaic.

In addition, we reviewed the INS Alien Files (known as "A-Files") of 104 detainees from our sample of 119 September 11 detainees: 44 of the 53 detainees in our MDC sample and 60 of the 66 detainees in our Passaic sample.[13] The INS was unable to provide us with the remaining 15 A-Files for these detainees. At the MDC and Passaic, we also reviewed the facilities' records pertaining to the 119 detainees in our samples, including their administrative, disciplinary, and medical files. In addition, we reviewed available FBI Headquarters and FBI field office records for 54 September 11 detainees identified by the INS on January 23, 2002, as having been held longer than 90 days after receiving voluntary departure or removal orders.[14]

We also examined INS and BOP policies and procedures relating to immigration charging, conditions of confinement, and access to counsel. These included agency detention standards as well as specific policies applicable to the MDC and Passaic that were developed prior to and

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[12] The INS provided us with a list of 30 September 11 detainees who were being held at Passaic in April 2002. However, when we conducted our site visit in May 2002, the INS had released or transferred 17 of the 30 detainees.

[13] The A-File, maintained by the INS, contains an alien's U.S. immigration history.

[14] See Chapter 6 for a discussion of final orders of removal.

after the September 11 attacks. We focused on how the BOP and INS implemented these standards, and we examined the actions of managers at the Headquarters and local levels regarding their adherence to these policies. In particular, we examined the following documents during our analysis:

- A database maintained by the INS's Custody Review Unit (CRU) that contains extensive INS records of the investigative and litigation histories of the September 11 detainees;
- A second CRU-maintained database that depicts the detention history of each September 11 detainee;
- A document used by FBI Headquarters to track the status of the detainee clearance process;
- The list of September 11 detainees cleared of connections to terrorism by the FBI New York Field Office (this FBI office conducted clearance investigations on more than 500 of the 762 September 11 detainees);
- FBI Headquarters files for a sample of 54 September 11 detainees maintained by the unit that coordinated the detainee clearance process, as well as corresponding FBI field office files for 46 of those 54 detainees; and
- The BOP's list of September 11 detainees held at the MDC.

In addition, we conducted more than 50 interviews of officials at the FBI, INS, BOP, and the Department of Justice regarding their involvement in developing and implementing the policies concerning the apprehension, detainment, investigation, and adjudication of September

11 detainee cases. Among the officials we interviewed were the Attorney General, the Deputy Attorney General (DAG), the Associate Deputy Attorney General responsible for immigration issues, and various officials in their offices; the Assistant Attorney General for the Criminal Division and attorneys from the Criminal Division involved in the September 11 investigation; the INS Commissioner; the INS Executive Associate Commissioner for Field Operations, the INS General Counsel, and a variety of other INS attorneys and staff; the FBI Director, the former Deputy Director, General Counsel, and other FBI officials; the BOP Director, the BOP's Assistant Director for Correctional Programs, and other BOP attorneys and staff; and officials in the Department's Executive Office for Immigration Review (EOIR).[15] During our fieldwork at the MDC and Passaic, we interviewed the wardens, supervisors, correctional officers, medical staff, and other employees who had contact with or oversight of September 11 detainees. In addition, we interviewed managers and employees in the FBI's New York Field Office and Newark Field Office, the INS's New York and Newark District Offices, and the U.S. Attorney's Office for the Southern District of New York.[16]

During our review, we also met several times with representatives of Amnesty International and Human Rights Watch, who offered information and discussed their concerns about the treatment of aliens arrested after September 11. In addition, these organizations helped arrange interviews with some September 11 detainees

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[15] Throughout this report, most individuals are identified using the title they held at the time of the event or action under examination.

[16] Organization charts for the Department, FBI, INS, and BOP are attached at Appendix C.

or their attorneys. We also met with representatives from the American Civil Liberties Union, the Center for Constitutional Rights, the Islamic Circle of North America, and the Legal Aid Society.

III. Organization Of This Report

This report is organized into ten chapters and begins with this introduction to the report. Chapter 2 describes the initial actions taken by the Department in Washington, D.C., and New York City that affected the arrest, detention, and investigation of the September 11 detainees. It discusses demographic statistics on the September 11 detainees, including their age, citizenship, location, and date of arrest. It also describes the procedure used by the FBI, INS, and BOP to review and process aliens detained on immigration charges in connection with the Department's terrorism investigation.

Chapter 3 discusses the charging of September 11 detainees with immigration violations. We identify policies, procedures, and issues that affected the timely charging of the detainees.

Chapter 4 examines the development and implementation of the Department's "hold until cleared" policy for September 11 detainees. It describes a series of operational orders issued by INS Headquarters to manage September 11 detainees. It also examines the processes implemented by the FBI to clear detainees of any connection to terrorism and the ramifications of this procedure on the detainees' length of confinement. We discuss why the FBI New York Field Office and INS New York District Office initially developed a separate list of September 11 detainees unbeknownst to FBI and INS Headquarters officials and the problems this presented. In addition, we describe the impact caused by the Department's decision to require Central Intelligence

Agency (CIA) name checks for each of the detainees. The chapter ends with an examination of the FBI's development of a "watch list" and its process for adding and removing names from that list.

Chapter 5 begins with basic information about federal immigration law, including the charging procedure for immigration violations, bond hearings, and removal proceedings.[17] It then examines the Department's opposition to bond for September 11 detainees and the INS's efforts to keep detainees in custody.

Chapter 6 discusses detainees with final removal and voluntary departure orders, the Department's decision to prevent removal of September 11 detainees until they were cleared by the FBI, and the eventual rescission of the policy. The chapter concludes with a review of the INS's compliance with a requirement that it conduct a review of the continued detention of aliens held for 90 days after they received removal orders. Chapters 7 and 8 examine the conditions of confinement experienced by September 11 detainees at the MDC and Passaic facilities. Chapter 7 evaluates conditions at the MDC, including allegations of physical and verbal abuse, access to legal counsel, medical care, recreation, and other issues. Chapter 8 examines similar issues for September 11 detainees confined at Passaic.

In Chapter 9, we offer a series of recommendations to address the issues discussed in this report. Chapter 10

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[17] The 1996 amendments to the immigration laws combined "deportation" and "exclusion" proceedings into "removal" proceedings. In this report, we use the term "removal proceedings" to refer to all proceedings that sought to deport, exclude, or remove aliens from the United States.

provides our conclusions. The 11 Appendices contain a glossary of names (Appendix A) and terms (Appendix B), organization charts, various memoranda, and sample INS forms.

CHAPTER TWO
ARREST AND PROCESSING OF ALIENS IN RESPONSE TO THE SEPTEMBER 11 ATTACKS

This chapter describes the Department's initial response to the terrorist attacks. First, we examine the immediate actions taken by the FBI and INS in New York City to arrest and detain aliens in connection with the terrorism investigation. Next, we describe the Department's philosophy as it related to aliens arrested in connection with the terrorism probe, and we discuss some of the processes developed at FBI and INS Headquarters to coordinate information about these detainee cases. We also provide demographic statistics about the September 11 detainees. In addition, we describe the system used by the FBI, INS, and BOP to review and process aliens detained on immigration charges in connection with the terrorism investigation.

I. Initial Law Enforcement Response

A. Initial FBI Response

The FBI took the lead in investigating the September 11 attacks, an investigation that became known as the Pentagon/Twin Towers Bombings investigation, or PENTTBOM. The FBI's investigation initially was affected by the chaotic situation in New York City as a result of the terrorist attacks, which displaced thousands of people from their homes and offices in lower Manhattan. As a result of the attacks, the FBI was forced to evacuate its New York City office in the Javits Federal Building at 26 Federal Plaza, seven blocks from what became known as "Ground Zero." Similarly, the INS was forced to

evacuate all detainees housed at its Service Processing Center at 201 Varick Street in Manhattan's lower West Side.[18]

The FBI's focus immediately after the attacks was whether any of the airplanes remaining in the air posed a threat. Once air traffic over the United States had ceased completely, the FBI turned its attention to locating those responsible for the terrorist attacks and preventing future attacks. During the evening of September 11, the FBI New York Field Office moved telephones, computers, facsimile machines, and other equipment into a temporary command post in a parking garage [REDACTED] [REDACTED] [REDACTED]. In addition to the [REDACTED] [REDACTED] site, the FBI created command posts [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED] near midtown Manhattan and at FBI offices in Queens and Long Island, New York.

With the help of the airlines and the INS, the FBI quickly determined the names used by the hijackers and immediately began to pursue leads related to them. During this initial period, the overall terrorism investigation was coordinated from the FBI's high-security Strategic Information and Operations Center (SIOC) located at FBI Headquarters in Washington, D.C. The FBI Headquarters in Washington, D.C. coordinated the New York aspects of the terrorism investigation through the FBI's New York Joint Terrorism Task Force (JTTF), a group

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[18] INS Service Processing Centers process and detain illegal aliens who are awaiting disposition of their immigration cases or awaiting removal from the country. A detainee could be held at a Service Processing Center from one day to several years.

composed of a variety of law enforcement agencies including the INS, the New York Police Department, and the Drug Enforcement Administration.[19] In addition, prosecutors from the U.S. Attorney's Office for the Southern District of New York (SDNY) and the Eastern District of Virginia, in conjunction with the Department's Criminal Division, worked closely with the New York JTTF to direct major aspects of the terrorism investigation from both Washington, D.C., and New York City.

The day after the attacks, officials at FBI Headquarters began developing a "watch list" that initially was designed to identify potential hijackers and other individuals who might be planning additional terrorist acts once air travel resumed. By September 14, the FBI had forwarded the watch list, which at this point contained more than 100 names, to the Federal Aviation Administration, commercial airlines, FBI field offices, the U.S. Border Patrol, the U.S. Customs Service, and 18,000 state and local police departments across the country. According to FBI Director Robert Mueller, the watch list ultimately contained the names of "individuals the FBI would like to

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[19] Each of the FBI's 56 domestic field offices now leads a JTTF in its respective geographic area of responsibility. The FBI's New York Division formed the first JTTF in 1980. Participants in JTTFs include the INS; U.S. Secret Service; Naval Criminal Investigative Service; U.S. Marshals Service; U.S. Customs Service; Bureau of Alcohol, Tobacco, and Firearms; U.S. Department of State/Diplomatic Security Service; Offices of Inspectors General; Postal Inspection Service; Internal Revenue Service; Department of Interior Bureau of Land Management; Air Force Office of Special Investigations; U.S. Park Police; Federal Protective Service; Defense Criminal Investigative Service; and other federal, state, and local law enforcement agencies.

talk to because we believe they have information that could be helpful to the [PENTTBOM] investigation."[20]

The FBI allocated massive resources to the September 11 terrorism investigation. Within 3 days of the attacks, more than 4,000 FBI special agents and 3,000 support personnel were assigned to work on the PENTTBOM probe. Six days after the attacks, FBI Director Mueller reported that more than 500 people representing 32 federal, state, and local law enforcement agencies were working 24 hours a day at FBI Headquarters. By September 18, 2001, 1 week after the attacks, the FBI had received more than 96,000 tips or potential leads from the public, including more than 54,000 through an Internet site it established for the PENTTBOM case, 33,000 that were forwarded directly to FBI field offices across the country, and another 9,000 tips called into the FBI's toll-free "hotline."

B. Department of Justice Response

In response to the September 11 attacks, the Attorney General directed all Department of Justice components to focus their efforts on disrupting any additional terrorist threats. As articulated in a September 17, 2001, memorandum to all United States Attorneys from Attorney General Ashcroft, the Department sought to prevent future terrorism by arresting and detaining violators who "have been identified as persons who participate in, or lend support to, terrorist activities. Federal law enforcement agencies and the United States Attorneys' Offices will use every available law enforcement tool to incapaci-

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[20] FBI Director Robert Mueller, Press Conference at FBI Headquarters (September 14, 2001). We discuss the development and eventual dissolution of this watch list in greater detail in Chapter 4.

tate these individuals and their organizations." Given the identities of the September 11 terrorists, the Department recognized from the earliest days that its terrorism investigation had a significant immigration law component.

The Attorney General summarized the Department's new focus in a speech he gave to the U.S. Conference of Mayors on October 25, 2001:

> Forty years ago, another Attorney General was confronted with a different enemy within our borders. Robert F. Kennedy came to the Department of Justice at a time when organized crime was threatening the very foundations of the Republic . . .
>
> Robert Kennedy's Justice Department, it is said, would arrest mobsters for "spitting on the sidewalk" if it would help in the battle against organized crime. It has been and will be the policy of this Department of Justice to use the same aggressive arrest and detention tactics in the war on terror.
>
> Let the terrorists among us be warned: If you overstay your visa—even by one day—we will arrest you. If you violate a local law, you will be put in jail and kept in custody as long as possible. We will use every available statute. We will seek every prosecutorial advantage. We will use all our weapons within the law and under the Constitution to protect life and enhance security for America.
>
> In the war on terror, this Department of Justice will arrest and detain any suspected terrorist who has violated the law. Our single objective is to prevent terrorist attacks by taking suspected terrorists off the street. If suspects are found not to have links to terrorism or not to have violated the law,

> they are released. But terrorists who are in violation of the law will be convicted, in some cases deported, and in all cases prevented from doing further harm to Americans.

The Attorney General told the OIG that he instructed that if, during the course of the investigation, aliens were encountered who had violated the law, they should be charged with appropriate violations, particularly if the alien had a relationship to the September 11 attacks.

The Deputy Attorney General explained to the OIG that the threat presented by terrorists who carried out the September 11 attacks required a different kind of law enforcement approach. He stated that the Department needed to disrupt such persons from carrying out further attacks by turning its focus to prevention, rather than investigation and prosecution.

Michael Chertoff, the Assistant Attorney General for the Criminal Division, told the OIG that within days of the attacks it became evident that some aliens encountered in connection with the PENTTBOM investigation were "out of status" in violation of the law—a matter that fell within the jurisdiction of the INS. He stated the Department's policy was to "use whatever means legally available" to detain a person linked to the terrorists who might present a threat and to make sure that no one else was killed. In some instances, he noted, that would mean detaining aliens on immigration charges, and in other cases criminal charges. Chertoff said he did not believe that the Department had a blanket policy to go with one or the other, if both were possible. He said he understood the Department would use whichever charge was most "efficacious." He stated that he was involved in meetings with the Attorney General, the Deputy Attorney General, and the FBI Director at which this philoso-

phy was discussed, but he added that, from the beginning, there was an insistence from senior Department officials that things be done legally. Chertoff explained that his deputy, Alice Fisher, was placed in charge of immigration issues for the Criminal Division.

Fisher told the OIG that during the fall of 2001 she spent the "majority" of her time on terrorism issues, some of which involved illegal aliens who presented a potential terrorism threat. She recalled that Chertoff told her "we have to hold these people until we find out what is going on." She said she understood that the Department was detaining aliens on immigration violations that generally had not been enforced in the past.

C. New York FBI's Response

The FBI Field Office in New York City and its JTTF received thousands of leads from the public related to terrorism in the weeks after September 11. Staff at the New York JTTF command post entered the leads into an FBI database that assigned each PENTTBOM lead a unique number. Leads then were sent to one of the four FBI command posts in the New York City area and assigned to a JTTF team that included FBI and INS agents, among other law enforcement personnel.

Many of the leads pursued by the JTTF in New York City and elsewhere across the country involved aliens, many from countries with large Arab or Muslim populations. If JTTF teams in New York encountered an illegal alien in the course of pursuing a PENTTBOM lead—whether or not the alien was the subject of the lead—the INS agent on the team examined the alien's immigration and identity documents to determine whether the alien was lawfully in the United States. If an INS agent was not present during the JTTF's initial interview of the individual, the team notified the INS New York District

Office, which dispatched an INS agent to determine the alien's immigration status. The team would arrest any alien encountered in the course of investigating a JTTF or PENTTBOM lead who was found to be in the country illegally.

Many of the aliens arrested under these circumstances were put into a special category referred to as persons "of interest" to the FBI. Their names were placed on a list referred to as "the INS Custody List." The INS and FBI did not always agree on which aliens should be included on the list, and we found that the cases were not handled uniformly nationwide. The complexities of how a person came to be included in this special category of immigration detainees is discussed in detail in Chapter 4, where we also examine some of the problems that arose from creation of this category of detainees. Moreover, as we describe later in this report, being labeled "of interest" had significant ramifications for the detainees' place and length of detention. The Department severely limited these detainees' ability to obtain bond, and detainees on this list could not be removed from the United States without a written "clearance letter" from the FBI. These requirements created substantial obstacles for detainees who sought release or removal. We describe these issues in more detail in the chapters that follow.

In conjunction with the New York FBI's JTTF, the U.S. Attorney's Office for the SDNY immediately began to investigate the terrorist attacks. David Kelley, the Deputy United States Attorney for the SDNY, helped direct the search warrants, subpoenas, and material witness warrants in the Southern District and also participated in the supervision of the PENTTBOM task force in Washington, D.C. Within one to three days after the attacks, Kelley explained, he focused on individuals "really"

of "investigative interest" (as opposed to those simply labeled "special interest" by the FBI or the INS). He explained that individuals of "genuine investigative interest" were people connected to a subject or target of the investigation, such as a person whose telephone number was linked to a hijacker, or a person who lived in a building near a location of high interest.

[PAGES 15 THROUGH 16 OMITTED]

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III. ASSIGNMENT TO A DETENTION FACILITY

Our review determined that September 11 detainees arrested in New York City generally were confined at the MDC or transported to Passaic and other INS contract facilities in northern New Jersey. The housing determination for a September 11 detainee was the result of a two-step process that began with the FBI's assessment of the detainee's possible links to terrorism. The FBI provided this assessment to the INS, which made the actual housing determination. Witnesses told the OIG that the INS's determination was based almost solely on the FBI's assessment.

Where a September 11 detainee was housed had significant ramifications on the detainee's detention experiences. Detainees housed at the MDC (discussed in Chapter 7) experienced much harsher confinement conditions than those held at Passaic (discussed in Chapter 8). The September 11 detainees held at the MDC were locked down 23 hours a day, were placed in four-man holds during movement, had restricted phone call and visitation privileges, and had less ability to obtain and communicate with legal counsel.

A. FBI Assessment

The first part of the process to determine where a September 11 detainee would be confined began with the FBI's initial assessment of the detainee's links to the PENTTBOM investigation or ties to terrorism. The FBI assessed a detainee as "high interest," "of interest," or "interest undetermined." The "high interest" detainees were considered by the FBI to have the greatest potential to be linked to the PENTTBOM investigation or to terrorism. The FBI believed the "of interest" detainees might have some terrorist connections. For the "interest undetermined" detainees, the FBI could not affirmatively state that the detainee did not have a connection to the September 11 attacks. As we discuss in Chapter 4, this assessment was not based on specified criteria or consistently applied to all detainees. In addition, the INS was not authorized to release a September 11 detainee until the FBI completed its clearance investigation because of the concern about inadvertently releasing a terrorist. Therefore, the FBI in New York City never labeled a detainee "no interest" until after the clearance process was complete.

Almost all the September 11 detainees in our review were arrested by the INS. Often an FBI agent present at the arrest provided the INS with a verbal assessment of the FBI's level of interest in the particular detainee. However, we found that this initial assessment often was based on little or no concrete information tying the detainee to the September 11 attacks or terrorism.

B. INS Housing Determination

After the INS arrested September 11 detainees, they were taken to an immigration processing center, such as the INS's Service Processing Center on Varick Street in New York City, to complete arrest and initial detention

processing (after the attacks the Center no longer housed detainees, but remained open for processing). The FBI New York Field Office identified its level of investigative interest in the detainee to the FBI's International Terrorism Operations Section (ITOS) at FBI Headquarters, which informed, usually verbally, the INS's National Security Unit (NSU). The information passed to the NSU by the FBI included a request that detainees of "high interest" be housed at the MDC.

From September 11 to 21, 2001, INS Executive Associate Commissioner for Field Operations Michael Pearson made all decisions regarding where to house September 11 detainees. According to Daniel Cadman, the NSU Director, NSU staff provided briefings to Pearson that consisted of the FBI's assessments, other derogatory information obtained during the investigation (if any), and the security risk posed by the detainee (if known). Based on this information, Pearson decided whether a detainee should be confined at a BOP facility (such as the MDC), an INS facility, or an INS contract facility (such as Passaic). Pearson's decision was relayed to the INS New York District, which transferred the detainees to the appropriate facility.

The INS's housing determination process changed on September 21, 2001, when the INS created the Custody Review Unit (CRU) at Headquarters and appointed three INS District Directors to make detainee housing determinations based on input provided by the FBI. At this point, Pearson removed himself from this decision-making process.

We were also told that some detainee housing determinations were made outside the process described above. Dan Molerio, Assistant District Director for Investigations in the INS New York District, said three

Assistant U.S. Attorneys from the Southern District of New York detailed to the FBI Headquarters contacted him on a number of occasions and identified "high interest" detainees held by the INS in New York. Molerio said the FBI's Assistant Special Agent in Charge for Counterterrorism in New York also called him on several occasions about "high interest" detainees. Molerio said when the FBI told him a detainee was "high interest," he would ensure that the detainee was sent to the MDC.

In sum, even though the INS established a process for making housing determinations, the INS's decision was based almost entirely on the FBI's assessment.

C. BOP Confinement Decisions

Soon after the September 11 attacks, the BOP made several decisions regarding the detention conditions it would impose on the September 11 detainees. These decisions (discussed in more detail in Chapter 7) included housing the detainees in the administrative maximum (ADMAX) Special Housing Unit (SHU), implementing a communications blackout, and classifying the detainees as Witness Security (WITSEC) inmates. According to Michael Cooksey, the BOP's Assistant Director for Correctional Programs, the BOP decisions were based on the BOP's concerns about potential security risks posed by the September 11 detainees. He said the BOP made the decision to impose strict security conditions in part because the FBI provided so little information about the detainees and because the BOP did not really know whom the detainees were. He said the BOP chose to err on the side of caution and treat the September 11 detainees as high-security detainees. He said that the Department was aware of the BOP's decision to house the September 11 detainees in high-security sections in various BOP facilities. Cooksey said the BOP did not treat the

September 11 detainees different than "regular" high-security inmates.

BOP Director Kathy Hawk Sawyer told the OIG that officials in the Deputy Attorney General's Office contacted her to discuss specific detainees' ability to communicate with other inmates and with the outside world. She said she understood from these conversations that the Department wanted the BOP to limit, as much as possible within their lawful discretion, the detainees' ability to communicate with other inmates and with people outside the MDC.[23]

D. Department of Justice's Role

Witnesses told us that the Department of Justice had little input into where the detainees were held. For example, Chertoff, the Assistant Attorney General in charge of the Criminal Division, said he did not have any information about where or how the detainees would be held, with the exception of one conversation in which he was told that an alien had claimed he was hurt by a guard. He said that he was later told that the report was inaccurate, and that the alien had not made such an accusation. David Israelite, Deputy Chief of Staff to the Attorney General, said he could not recall any discussions of holding people "incommunicado" or any discussion of where detainees should be held. He also recalled one allegation of mistreatment being called to the attention of the Attorney General, who he said asked staff to look into the incident.

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[23] We discuss Hawk Sawyer's conversations with Christopher Wray, Principal Associate Deputy Attorney General, and David Laufman, Chief of Staff to the Deputy Attorney General, in Chapter 7.

Alice Fisher, the Deputy Assistant Attorney General who was in charge of terrorism issues for the Criminal Division, stated that she had no information about which facility a detainee would go to or the conditions that would be imposed on the detainees. She noted that there was an "effort" to accommodate the needs of the Assistant U.S. Attorneys who were conducting the grand jury investigation into the attacks. David Kelley, the Deputy U.S. Attorney for the SDNY who played an important role in the September 11 investigation, said he had no input into where people would be confined, except that a person might be moved to the New York area if he was needed to testify. An Assistant U.S. Attorney from the SDNY who worked on the terrorism investigation explained that he generally did not have input into where detainees would be held. He recalled being frustrated that the BOP did not distinguish between detainees who, in his view, posed a security risk and those detained aliens who were uninvolved witnesses.

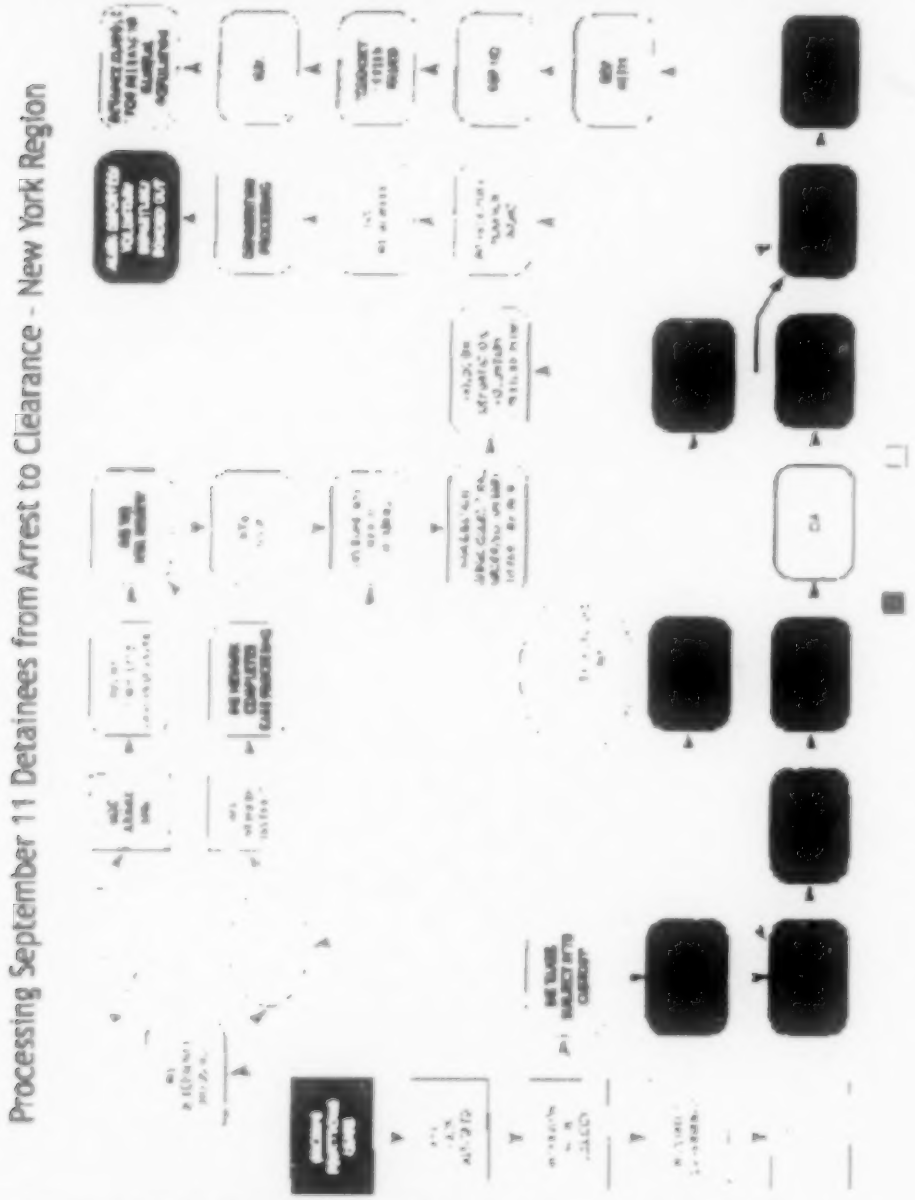
[PAGES 21 THROUGH 22 OMITTED]

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V. Processing Of September 11 Detainees From Arrest To Clearance

Perhaps the factor that most significantly affected the length of a September 11 detainee's confinement was the nature of the multi-step, multiagency process used by the Department for handling aliens detained as part of its terrorism investigation. The OIG developed the following flow chart (Figure 6) to depict the process for handling September 11 detainees from their initial encounter with law enforcement authorities through their release from custody or removal from the United States. The chart displays the process used by the Department to investigate PENTTBOM leads, arrest September 11 de-

tainees, determine where to house them, conduct detainee clearance investigations, complete the INS hearings and removal proceedings, and remove the detainees.[24]



[24] The chart depicts the process for September 11 detainees held at the MDC or Passaic. Some detainees only went through part of this process, depending on their individual immigration cases and the progress of their FBI clearance checks. The "BOP Process" shown in the chart applied only to those detainees housed at the MDC.

The following steps describe the procedures depicted by this chart:

Arrest Process:

1. U.S. law enforcement received information regarding an individual who may have connections to the September 11 attacks or terrorism in general (a PENTTBOM lead).

2. If deemed worthy of investigation, the responsible FBI field office assigned the lead for investigation (in New York City, generally to the JTTF).

3. Law enforcement personnel interviewed the individual, and an INS agent determined his immigration status. The subject was released if the FBI expressed no investigative interest related to the terrorism probe and the individual had not violated his immigration status.

4. If the INS agent determined that the alien was in violation of immigration status, the INS agent took the alien into custody and asked the FBI for an assessment of its interest in the alien with respect to the terrorism investigation.

5. The FBI determined its level of interest in the alien: generally "of interest," "high interest," "no interest," or "undetermined." Based on this assessment by the FBI, "high interest detainees" were sent to BOP high-security facilities, while "of interest" and "interest unknown" detainees generally were housed in less restrictive facilities, such as county jails under contract to the INS.

FBI Clearance Process:

1. After the FBI received the detainee's A-File from the INS, the FBI initiated detainee clearance investigations and notified the SIOC Working Group that the alien was in custody. The Department had issued a standing

order that detainees were not to be released until clearance investigations were completed.

2. The SIOC Working Group requested CIA checks on the detainee.

3. If clearance investigations and CIA checks on the detainee were clear, the detainee was determined to be of "no interest" to the FBI.

4. The FBI's ITOS decided the final clearance of a September 11 detainee and issued a formal FBI clearance letter, signed by the ITOS Section Chief. Until the FBI issued the clearance letter, the Department did not allow the INS to remove the detainee.

5. The SIOC Working Group forwarded the FBI clearance letter to the INS or BOP, whichever agency was holding the alien. If the BOP was holding the alien, BOP Headquarters then issued its clearance memorandum to the BOP facility, called a "Cooksey memorandum," notifying the appropriate warden that a detainee was eligible for release into the facility's general population.[25]

INS Immigration Process:

1. After INS Headquarters review, the INS District Director in the INS district where the September 11 detainee was arrested issued the charging document to the detainee (known as the "Notice to Appear" or NTA) that describes the immigration laws the detainee has allegedly violated. The INS initially held all September 11 detainees without bond, but the detainees were able to request bond re-determination hearings before an Immi-

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[25] Cooksey memoranda were signed by Michael Cooksey, the BOP Assistant Director for Correctional Programs.

gration Judge after receiving the NTA and accompanying documents.

2. An Immigration Judge conducted a hearing on the detainee's alleged immigration violations (a "merits hearing") to determine whether the detainee should be removed from the United States.

3. The Immigration Judge issued a final order removing the detainee or permitting the detainee to leave the country voluntarily.

4. INS Headquarters issued its clearance memorandum—known as the "Pearson memorandum"—to the appropriate INS Region Office.[26] Issuance of the INS clearance letter was predicated on the INS receiving a clearance letter from the FBI stating that it had "no interest" in the detainee, as described above.

5. The alien was either removed from the United States, allowed to depart voluntarily, or released from INS custody.

The impact of each of these procedures on the length of the September 11 detainees' detentions and their conditions of confinement is discussed in detail in the chapters that follow.

[PAGES 27 THROUGH 36 OMITTED]

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CHAPTER FOUR
THE CLEARANCE PROCESS

This chapter examines the Department's process for clearing the September 11 aliens who were detained be-

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[26] Pearson memoranda were signed by Michael Pearson, then the INS Executive Associate Commissioner for Field Operations.

cause of possible links to terrorism. Specifically, we examine how problems with the process significantly lengthened the time detainees spent in custody. First, we discuss the origins of the Department's directive that all September 11 detainees be held until the FBI cleared them of any connection to terrorism. Next, we examine the series of Operational Orders issued by INS Headquarters to its field offices in the weeks immediately following the September 11 attacks that sought to address the growing number of detainees arrested in connection with the PENTTBOM investigation.

We then turn to the process developed by the Department to clear the detainees of any connection to terrorism. In particular, we examine the activities of the squad created by the FBI New York Field Office that conducted most of the clearance investigations of September 11 detainees. We then describe the problems caused when the INS New York District failed to inform Headquarters of the arrest of hundreds of aliens "of interest," and the discovery of a separate list of September 11 detainees kept by the FBI New York Field Office in the weeks immediately following the terrorist attacks, a list apparently unknown to FBI and INS officials in Washington, D.C. who were attempting to coordinate all September 11 detainee cases. We also discuss the effects of detainee name checks in databases maintained by the Central Intelligence Agency (CIA). We end by examining the FBI's development of a "watch list" of potential terrorist suspects and its process for adding and removing names from that list.

I. "HOLD UNTIL CLEARED" POLICY

A. Origins of Policy

Officials from the FBI and the INS told the OIG they clearly understood from the earliest days after the ter-

rorist attacks that the Department wanted September 11 detainees held without bond until the FBI cleared them of any connections to terrorism. This "hold until cleared" policy was not memorialized in writing, and our review could not determine the exact origins of the policy. However, this policy was clearly communicated to INS and FBI officials in the field, who understood and applied the policy.

We found that the directive was communicated to the INS and the FBI by a number of Department officials, including Stuart Levey, the Associate Deputy Attorney General responsible for oversight of immigration issues. Michael Pearson, the INS Executive Associate Commissioner for Field Operations, said that Levey called a senior INS official the week after the September 11 attacks and directed that no INS detainees should be released without being cleared by the FBI. Pearson said he also received instructions from INS Commissioner James Ziglar that none of the detainees should be released by the INS until they had been cleared by the FBI of any connections to terrorism. Pearson told the OIG that he passed these instructions along to employees at INS Headquarters's units assigned to handle September 11 detainee cases.

Similarly in the FBI, our interviews and review of documents confirm that FBI officials understood and applied the "hold until cleared" policy. For example, an October 26, 2001, electronic communication (EC) (similar to an e-mail) from an FBI agent in the SIOC to FBI field offices stated that, "Pursuant to a directive from the Department of Justice, the INS will only remove individuals from [the special interest] list after the INS has received a letter from FBIHQ [FBI Headquarters] stating that the FBI has no investigative interest in the detainee."

In addition, an attorney with the FBI's Office of General Counsel who worked on the SIOC Working Group told the OIG that it was understood that the INS was holding September 11 detainees because the Deputy Attorney General's Office and the Criminal Division wanted them held. She said the Deputy Attorney General's Office took a "very aggressive stand" on this matter, and the Department's policy was clear even though it was not written.

Levey told the OIG that the idea of detaining September 11 detainees until cleared by the FBI was "not up for debate." He said he was not sure where the policy originated, but thought the policy came from "at least" the Attorney General.

A Senior Counsel in the Deputy Attorney General's Office who worked closely with Levey on immigration matters ("Senior Counsel to the DAG") stated in her response to the draft of this report that those involved in the discussion of the process, including attorneys from the INS, OIL, and the Criminal Division (including TVCS), were aware that the strategy had risks, and clearly anticipated the filing of habeas corpus petitions because of the position the Department planned to take that any illegal alien encountered pursuant to a PENTTBOM lead should be detained until cleared by the FBI. She noted that this was "unchartered [*sic*] territory." On September 27, 2001, the Senior Counsel sent an e-mail to David Ayers, Chief of Staff to the Attorney General, on September 27, 2001, that discussed this "hold until cleared" policy. The e-mail described the "strategy for maintaining individuals in custody." The document attached to the e-mail, entitled "Maintaining Custody of Terrorism Suspects," begins with a "Potential AG Explanation" that states:

> The Department of Justice (Department) is utilizing several tools to ensure that we maintain in custody all individuals suspected of being involved in the September 11 attacks without violating the rights of any person. If a person is legally present in this country, the person may be held only if federal or local law enforcement is pursuing criminal charges against him or pursuant to a material witness warrant. Many people believed to be involved in the attacks, however, are not present legally and they may be detained, at least temporarily, on immigration charges. As of September 27, 2001, the Immigration and Naturalization Service (INS) was detaining without bond 125 aliens related to this investigation on immigration charges.

The document then describes plans for handling bond hearings and coordination efforts among the FBI, INS, and Criminal Division to ensure that September 11 detainees would remain in custody. Levey told us this document was drafted to enable the Attorney General to provide an explanation as to how, within the bounds of the law, the Department could hold and not release aliens who were suspected of terrorism.

Other senior Department officials confirmed that the directive to hold the September 11 detainees without bond stemmed from discussions at the highest levels of the Department. Assistant Attorney General Michael Chertoff told the OIG that in the early days after the terrorist attacks the issue was discussed among the Attorney General, Deputy Attorney General, and FBI Director that detention should be sought of a charged person "if there is a link to the hijackers and we are not able to assure that the person is not a threat and there is a legal violation." Alice Fisher, a Deputy Assistant Attorney

General in the Criminal Division and a participant in the SIOC Working Group, told the OIG that Chertoff told her that "we have to hold these people until we find out what is going on" and that, in some cases, they could use immigration charges to keep the detainees in custody.

David Laufman, Chief of Staff to the Deputy Attorney General, told the OIG that he recalled a meeting which INS representatives attended soon after the terrorist attacks that included a discussion of whether potential immigration violations could be "leveraged" against September 11 detainees when there was insufficient information for criminal cases. He added that it was recognized that, "if we turn one person loose we shouldn't have, there could be catastrophic consequences." He said he recalls, however, asking Levey to take whatever steps were appropriate to expedite clearance by the FBI and the CIA.

Daniel Levin, Counselor to the Attorney General, told the OIG that he could not say for certain when the clearance policy was developed or at what level. He described a "continuous meeting" for the first few months after the terrorist attacks involving the Attorney General, Deputy Attorney General, FBI Director, and Chertoff, and said he was sure that the issue of holding aliens until they were cleared was discussed.

The Deputy Attorney General told the OIG that he remembers the "decision to hold without bond" being discussed, and that he was in favor of requiring the clearance process "within the bounds of the law." He explained that the threat after September 11 was a different threat that required a different approach. He said that investigating and prosecuting could not be the focus, as it had been before the terrorist attacks, and the Department needed to aggressively protect public safety,

within the bounds of the law, by disrupting and preventing further incidents.

FBI Director Mueller stated that he did not recall being involved in any discussions about the creation of the "hold until cleared" policy, although he learned about the policy later.

When asked about a "hold until cleared" policy, the Attorney General told the OIG that the Department would want to know whom the detainees were if it was getting ready to remove them. He noted the inherent difficulty involved in conducting a "clearance" process, in that clearing someone is akin to "proving a negative." He also noted that the Department does not assert that it could hold anyone "forever" without regard to a predicate offense. However, the Attorney General said he had no reluctance to do those things legally permissible to detain someone who had violated the law.

B. Implementation of Policy

From the first days after the terrorist attacks, the INS adopted the term "of interest" to identify aliens arrested on immigration violations in connection with the September 11 investigation who needed to be cleared by the FBI of any connections to terrorism before they could be released or removed from the United States. Detainees who were not "of interest" to the FBI's terrorism investigation did not have to be cleared by the FBI and could be processed according to normal INS procedures. The FBI was responsible for determining whether an alien arrested in connection with a PENTTBOM lead on immigration charges should be further investigated. If it found further investigation warranted, then the alien was "of interest" and the FBI notified the INS of that determination. However, there were many cases where the FBI told the INS that it could not determine

at the outset whether it had an interest in the alien. In cases of affirmative FBI interest or a statement that interest could not be determined, the INS treated the alien as "of interest."

Problems quickly arose upon implementation of the "hold until cleared" policy for aliens arrested on PENTTBOM leads, because the Department and the FBI did not develop clear criteria for determining who was, in fact, "of interest" to the FBI's terrorism investigation. From our interviews, we determined that, for the most part, aliens were deemed "of interest" based on the type of lead the law enforcement officers were pursuing when they encountered the aliens, rather than any evidence that they were terrorists. In the New York City area, for example, anyone picked up on a PENTTBOM lead was deemed "of interest" for purposes of the "hold until cleared" policy, regardless of the strength of the evidence or the origin of the lead. A PENTTBOM lead was considered any lead that was in any way connected to the World Trade Center or Pentagon investigation, or a lead that raised the specter of "suspicious activity" by an alien who might possibly be a terrorist. However, there need not be any evidence of connection to the terrorists or to the World Trade Center or Pentagon bombings for a lead to be considered a PENTTBOM lead. Any illegal alien encountered by New York City law enforcement officers following up a PENTTBOM lead—whether or not the alien turned out to have a connection to the September 11 attacks or any other terrorist activity—was deemed to be a September 11 detainee.

In a January 2002 court proceeding, the Department defined the term "September 11 detainees" as "individuals who were originally questioned because there were indications that they might have connections with, or

possess information pertaining to, terrorist activity against the United States including particularly the September 11 attacks and/or the individuals and organizations who perpetrated them."[36]

Many of the persons arrested as part of the PENTTBOM investigation were aliens unlawfully present in the United States either because they entered this country illegally or because they entered legally but remained after their authorization to do so had expired. It is unlikely that most if not all of the individuals arrested would have been pursued by law enforcement authorities for these immigration violations but for the PENTTBOM investigation.[37] Some appear to have been arrested more by virtue of chance encounters or tenuous connections to a PENTTBOM lead rather than by any

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[36] This definition was contained in the declaration of James Reynolds, Chief of the Terrorism and Violent Crime Section in the Department's Criminal Division (the "Reynolds Declaration"), submitted by the Department on January 11, 2002, in support of the Department's summary judgment motion in connection with the case entitled *Ctr. for Nat'l Sec. Studies* v. *U.S. Dep't of Justice*, 01-civ-2500 (D.D.C. filed Dec. 6, 2001).

[37] The September 11 attacks focused renewed attention on the importance of knowing when nonimmigrant visitors enter and depart the United States. The OIG has reported previously on the INS's efforts to identify and remove nonimmigrant overstays, most recently in an April 2002 follow-up report that found the INS has made little progress to effectively address the issue. The follow-up review concluded that the INS still did not have a reliable system to track overstays, did not have a specific overstay enforcement program, and could not provide accurate data on overstays. See Follow-Up Report on INS Efforts to Improve the Control of Non-Immigrant Overstays, Report No. I-2002-006, April 2002, available at http://www.usdoj.gov/oig/inspection/I-2002-006/report.pdf.

genuine indications of a possible connection with or possession of information about terrorist activity.

For example, on September 15, 2001, New York City police stopped a group of three Middle Eastern men in Manhattan on a traffic violation. The men had the plans to a public school in their car. The next day, their employer confirmed that the men were working on construction at the school and that it was appropriate for them to have the plans. Nonetheless, they were arrested and remained detained as September 11 detainees. Another alien was arrested on September 22, 2001, because the phone company mistakenly put his phone calls home to [REDACTED] on the bill of a New York [REDACTED] office and the [REDACTED] office called to report the "suspicious" bill. The alien was arrested, detained on immigration charges, and considered a September 11 detainee. He was not cleared until January 9, 2002. Another Middle Eastern alien was arrested because he went to a car dealership on September [REDACTED], 2001, and was anxious to purchase a car right away. He put down a [REDACTED] deposit on a car but did not return on September [REDACTED], 2001, for the car as he agreed he would. He was arrested on September 29, 2001 and was not cleared until April 29, 2002. Another alien was arrested because a person called the FBI a few days after the terrorist attacks to say that six to ten weeks prior, the [REDACTED] [REDACTED] [REDACTED] [REDACTED] she hired through [REDACTED] [REDACTED] [REDACTED], who was an [REDACTED] male, told her that he was a licensed pilot and was saving to go to flight school in the U.S. to learn to fly commercial

jets. He was arrested on September 24, 2001, and not cleared until February 12, 2002.[38]

In the days immediately following the September 11 attacks, before the clearance process was centralized in Washington, D.C., the INS could obtain an indication of "no interest" from an FBI field office and proceed to process the alien as a "regular" immigration case. In mid-September 2001, however, the Department instructed the INS that before it could treat a September 11 detainee as a "normal" immigration case, the INS needed to obtain a clearance letter from Michael Rolince, Chief of the FBI's International Terrorism Operations Section (ITOS) in its Counterterrorism Division.[39] According to several witnesses with whom we spoke, the FBI and the Department believed that the PENTTBOM investigation should be viewed as a "mosaic" that contained countless individual pieces of information and evidence, and field offices would not be in a position to determine if any single item was of significance to this mosaic. Therefore, it was believed that FBI Headquarters would have a broader perspective on the PENTTBOM investigation and would be in a better position to make an assessment of whether an individual alien detained in connection with a PENTTBOM lead was "of interest" to the investigation. However, as we describe below, this centralized clearance process was slow and insufficiently staffed, resulting in many detainees being held for long periods of time while no clearance investigations were being conducted.

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[38] Other examples of tenuous PENTTBOM leads that led to detainee arrests and their designation as "of interest" to the September 11 investigation were described in Chapter 2.

[39] A copy of a "Rolince" clearance letter is attached at Appendix E.

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CHAPTER SEVEN
CONDITIONS OF CONFINEMENT AT THE METROPOLITAN DETENTION CENTER IN BROOKLYN, NEW YORK

I. INTRODUCTION

Almost 60 percent of the 762 aliens detained in connection with the Government's investigation of the September 11 terrorist attacks were arrested in the New York City area. As discussed previously, the overwhelming majority of these aliens were arrested on immigration charges that, in a time and place other than New York City post-September 11, would have resulted in either no confinement at all or confinement in an INS or INS contract facility pending an immigration hearing. However, fear of additional terrorist attacks in New York City and around the country changed the way aliens detained in connection with the investigation of the September 11 attacks were treated.

Aliens arrested by the INS on immigration charges who were deemed by the FBI to be of "high interest" to its terrorism investigation were held in high-security federal prisons across the country, such as the Federal Bureau of Prisons's (BOP) Metropolitan Detention Center (MDC) in Brooklyn, New York.[88] Overall, the BOP confined 184 September 11 detainees in its facilities nationwide. A total of 84 detainees determined by the FBI

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[88] The MDC is a 9-story BOP facility in Brooklyn that generally houses men and women either convicted of criminal offenses or awaiting trial or sentencing. On December 10, 2002, the MDC housed 2,441 men and 181 women.

to have a possible connection with the PENTTBOM investigation or terrorism in general were housed at the MDC from September 14, 2001, to August 27, 2002.

Generally, aliens deemed by the FBI to be "of interest" or "of undetermined interest" to the Government's terrorism investigation were detained in lower security facilities, such as the Passaic County Jail in Paterson, New Jersey (Passaic). From September 2001 to May 2002, 400 September 11 detainees were confined in Passaic.

This chapter examines the conditions of confinement for September 11 detainees held at the MDC, while the next chapter examines conditions experienced by September 11 detainees at Passaic. As we discuss in these two chapters, the FBI's initial assessment of its level of interest in specific September 11 detainees directly affected the detainees' conditions of confinement within the institution and their access to telephones, legal counsel, and their families.

In this chapter, we discuss the BOP's initial communications blackout after the terrorist attacks; its classification of September 11 detainees as "witness security" inmates; the MDC's administrative maximum (ADMAX) Special Housing Unit (SHU), a special high-security section of the facility where September 11 detainees were held until cleared by the FBI of involvement with terrorism; the MDC's process for transferring September 11 detainees from the ADMAX SHU to the facility's general population; the detainees' access to legal counsel; allegations of physical and verbal abuse made by detainees against MDC staff; and other condition of confinement issues, including consular visits, recreation opportunities, medical care, and lighting conditions in the ADMAX SHU cells.

II. Initial Communications Blackout After September 11

Immediately after the September 11 attacks, the BOP ordered all detainees who were "convicted of, charged with, associated with, or in any way linked to terrorist activities" to be placed in the highest level of restrictive detention. Also, MDC officials placed all incoming September 11 detainees in the ADMAX SHU without conducting the routine individualized assessment. BOP Director Kathy Hawk Sawyer told the OIG that this designation resulted from the FBI's assessment and was not the BOP's "call." Detainees held in the MDC's ADMAX SHU were subjected to the most restrictive conditions of confinement authorized by BOP policy, including "lockdown" for 23 hours a day, restrictive escort procedures for all movement outside of the ADMAX SHU cells, and tight limits on the frequency and duration of legal telephone calls.

Hawk Sawyer told the OIG that the detainees were held under these restrictive detention conditions, in part because the BOP did not know who the detainees were or what security risks they might present to BOP staff and facilities. She said the policies applied to the September 11 detainees were not new policies created specially for the detainees. Rather, the policies were longstanding BOP practices for housing inmates who presented special security concerns. She noted that on any given day persons are detained by the BOP in conditions exactly like those applied to the September 11 detainees.

Hawk Sawyer informed the OIG that the Department did not initially give the BOP any guidance on how to confine the detainees. However, she said the Deputy Attorney General's Chief of Staff, David Laufman, and the Principal Associate Deputy Attorney General, Christo-

pher Wray, called her during the weeks after September 11 with concerns about detainees' ability to communicate both with those outside the facility and with other inmates. Hawk Sawyer said she discussed specific September 11 detainees during these conversations as well as the detainees in general. Hawk Sawyer stated that Laufman's and Wray's concerns about the detainees' ability to communicate both with those outside the facility and with other inmates confirmed for her that the BOP's initial decision to restrict detainee communications with persons outside the facility and to isolate them from the general inmate population and from each other was appropriate.

Hawk Sawyer also told the OIG that she had conversations with David Laufman and Christopher Wray from the Office of the Deputy Attorney General, in which she was told to "not be in a hurry" to provide the September 11 detainees with access to communications—including legal and social calls or visits—as long as the BOP remained within the reasonable bounds of its lawful discretion. Hawk Sawyer emphasized that Department officials never instructed her to violate BOP policies, but rather to take the policies to their legal limit in order to give officials investigating the detainees time to "do their job."

Laufman, Chief of Staff to the Deputy Attorney General, confirmed the substance of the conversations described by Hawk Sawyer. He told the OIG that he urged the BOP to exercise the full scope of its discretion to sequence detainee outside contacts on the "back end" of the BOP's discretion. Wray stated that when he contacted Hawk Sawyer about some specific criminal inmates connected to terrorism who were already in BOP custody at the time of the September 11 attacks, he discussed hav-

ing these inmates placed under the most secure conditions possible. He stated that while he does not recall giving any specific instructions, he stated that the "spirit" of his comments was that the BOP should, within the bounds of the law, push as far toward security as they could.

On September 12, 2001, David Rardin, the BOP's Northeast Region Director (which includes the MDC), directed wardens in his region not to release inmates classified by the BOP as "terrorist related" from restrictive detention in SHUs "until further notice." Rardin also ordered a communications blackout for September 11 detainees during a telephone conference call with all Northeast Region Wardens on September 17, 2001. Consequently, MDC staff did not allow detainees to receive telephone calls, visitors, or mail, or to place telephone calls or send mail until the BOP received information concerning the security risks presented by the detainees.

We could not determine with any certainty the length of the communications blackout that affected September 11 detainees in BOP facilities. However, based on multiple witness interviews, the blackout appears to have lasted from several days to several weeks. According to Michael Cooksey, the BOP Assistant Director for Correctional Programs, all September 11 detainees initially were held incommunicado, but after 8 to 10 days detainees were permitted limited attorney and social contacts. John Vanyur, Senior Deputy Assistant Director in the BOP's Correctional Programs Division, told the OIG that the detainees had no external contacts for the first few weeks after the terrorist attacks until the BOP received more information on the September 11 detainees being held in BOP facilities.

Fifteen of the September 11 detainees we interviewed who were placed in the MDC between September 14 and October 16, 2001, told the OIG that this "communications blackout" continued until mid-October 2001.[89] The detainees said that during this period, MDC staff did not permit them visitors, legal or social telephone calls, or mail.

The BOP, in comments submitted to the OIG after reviewing the draft of this report, stated that "at no time did the [BOP] prohibit detainees from sending outgoing mail" that would have informed detainee attorneys and family members where they were being held. Our interviews with MDC staff and September 11 detainees and BOP documents contradict this assertion. For example, a conference call between the Eastern Regional Director on September 20, 2001, and various wardens (including MDC Warden Zenk) re-established legal visits, legal telephone calls, and legal mail for the September 11 detainees. However, detainees continued to be denied social visits, non-legal telephone calls, and non-legal mail until approximately mid-October 2001.

By the same token, the detainees' recollections that the communications blackout lasted until mid-October 2001 conflicted with MDC records showing detainees meeting with some consular officials and attorneys in early October 2001. On October 1, 2001, Cooksey issued procedures to all BOP facilities housing September 11 detainees that should have ended the communications

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[89] Because the September 11 detainees did not have calendars or clocks in their ADMAX SHU cells, during their interviews with the OIG most of the detainees estimated dates when specific events occurred.

blackout that had been imposed on the detainees.[30] This memorandum permitted "legal mail, legal calls, and legal visits for September 11 detainees in accordance with written Bureau (BOP) policy." Yet, even though this communications blackout was supposed to be lifted by Cooksey's October 1 memorandum, the way the BOP classified September 11 detainees created significant restrictions on access to detainees, which we describe below.

III. Impact Of Detainee Classification

A. Detainees' Classification

The BOP initially classified all September 11 detainees it housed as Witness Security, or WITSEC, inmates.[31] Witness Security inmates generally are individuals who agree to cooperate with law enforcement, judicial, or correctional authorities by providing evidence against persons or groups involved in illegal activities. Because their cooperation with the Government can place their lives in jeopardy, the BOP takes significant precautions

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[30] "Guidance for Handling of Terrorist Inmates and Recent Detainees," October 1, 2001, memorandum from Michael B. Cooksey, Assistant Director, Correctional Programs Division, BOP.

[31] See September 21, 2001, memorandum from Cooksey to BOP Regional Directors and Wardens categorizing September 11 detainees as "General Population WITSEC" in the BOP's SENTRY system. SENTRY is the BOP's database for monitoring the movement and management of all BOP inmates. BOP management was uncertain about the potential security risks posed to BOP staff and to other BOP inmates by the September 11 detainees. They believed that they needed to provide a greater measure of security for the September 11 detainees. The WITSEC categorization, with its accompanying additional security provisions, provided BOP management with a quick, "off-the-shelf" methodology to address their security concerns.

to ensure the safety of WITSEC inmates. Accordingly, any information about WITSEC inmates is closely guarded, such as their identity, location, and status.

Normally, the arresting agency would inform the BOP of the person's status and the need for WITSEC protection, but the BOP classified the detainees in this category without any individual assessment of the circumstances of their arrests.

When applied to the September 11 detainees, the WITSEC classification resulted in MDC officials withholding information about the detainees' status and location. This made it very difficult for attorneys, family members, and, at times, law enforcement officers to visit September 11 detainees or even determine their location. For example, because information on WITSEC inmates is so strictly protected, staff who worked at the MDC's reception desk did not know specific detainees were confined at the MDC and often told people inquiring about a September 11 detainee that the detainee was not being held at MDC when, in fact, he was. The MDC reception staff instead would refer the caller or visitor to the BOP's National Locator systems for information about the detainee.[92] Yet, because WITSEC inmates are not listed in

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[92] Members of the public have access to at least two resources to obtain information about inmates—including September 11 detainees—in the BOP's custody. The first resource, the Inmate Locator on the BOP's website (www.bop.gov), allows people to search the BOP database using a variety of criteria, including the inmate's name and BOP or INS number. When a match is made, the Inmate Locator provides the following information: the inmate's name; BOP Register Number; age; race; sex; projected release date; date released; and the name of the BOP facility holding the inmate. The information, which comes from the BOP's main inmate database, is updated daily with data on both sentenced and pre-trial inmates.

the BOP's National Locator systems, people who accessed the registry to inquire about September 11 detainees were unable to obtain any information about where a particular detainee was being held.

The OIG interviewed four attorneys who each represented a September 11 detainee housed at the MDC about their initial efforts to contact their clients. Three of the attorneys told us that they were informed by MDC front desk staff at some point that their clients were not present at the MDC when, in fact, their clients were being held in the facility at the time. One attorney told us that when she went to the MDC to attempt to locate her client, MDC staff checked their "system" and informed her that her client was not housed at MDC. After she complained, another MDC employee came to the front desk, informed the attorney that her client was in the MDC, and authorized her to meet with him.

Another attorney told the OIG that he went to the MDC after front desk staff had informed his paralegal that his client was not housed at the facility. The attorney said he provided the MDC front desk staff with numerous combinations of his client's name, which contained five different parts. The attorney said he again was told that his client was not housed at the MDC. The attorney also visited the INS's Varick Street Service Processing Center in Manhattan in a failed effort to lo-

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The second public resource, the BOP Telephone Inmate Locator, provides callers with information on federal inmates. To obtain inmate information, the caller must have any one of the following criteria to provide to a BOP operator: BOP Register Number; U.S. Marshals Service Number, FBI Number, DCDC Number, or INS Number; or the inmate's first and last names and age.

cate his client. In fact, his client was in the MDC at the time.

In addition to lifting the initial communications blackout for September 11 detainees, Cooksey's October 1, 2001, memorandum established a new inmate classification that was used for the September 11 detainees—Management Interest Group 155 (Group 155)—in part to address the lack of information the BOP was providing to attorneys and family members about the detainees. However, Cooksey's October 1 memorandum directed all BOP staff, including staff at the MDC, to continue holding September 11 detainees in the most restrictive conditions of confinement possible until the detainees could be "reviewed on a case-by-case basis by the FBI and cleared of any involvement in or knowledge of on-going terrorist activities."[93] As a result, the BOP continued to use "WITSEC" as its primary designation for September 11 detainees and "Group 155" as a secondary designation. Therefore, the tighter restrictions that flowed from the WITSEC designation continued to apply to all September 11 detainees, and difficulties that families and attorneys had trying to locate the September 11 detainees continued.

Four senior managers at BOP Headquarters, including Senior Deputy Assistant Director John Vanyur, acknowledged to us that the BOP's initial designation of September 11 detainees as WITSEC inmates caused

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[93] According to Cooksey's October 1 memorandum, all detainees who entered the MDC "on or after September 11, 2001" and "may have some connection to or knowledge of" the events of that day or terrorism activities, were to be housed "in the Special Housing Unit [SHU]" in the "tightest" allowable conditions until cleared by the FBI.

administrative confusion. The MDC Warden's Executive Assistant told the OIG that briefings for MDC staff in the weeks after the terrorist attacks did not provide clear guidance about how to handle inquiries from the public about September 11 detainees, particularly to staff assigned to the visitors' desk in the MDC's front lobby. MDC Warden Michael Zenk and the MDC Associate Warden for Programs both confirmed that staff at MDC's front desk had turned away visitors—including attorneys—who sought to contact September 11 detainees because of confusion surrounding the WITSEC/Group 155 designation initially assigned to the September 11 detainees.[94]

The WITSEC designation also impeded law enforcement interviews of September 11 detainees. MDC staff told the OIG that several law enforcement officials in the New York area who called the MDC to schedule detainee interviews shortly after the terrorist attacks were told that a particular detainee was not housed at the MDC. To address this problem, MDC staff established a process under which law enforcement officers contacted staff in the MDC Command Center or one of the Lieutenants responsible for supervising the ADMAX SHU in advance of their arrival to schedule an interview and to ensure that the September 11 detainee was housed at the MDC.

In response to the continuing confusion about access to the detainees and obtaining information about the detainees, the BOP established another new classification for September 11 detainees. In an October 31, 2001, memorandum, Cooksey removed the WITSEC designa-

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[94] Dennis Hasty was the MDC Warden at the time of the September 11 attacks and was replaced by Zenk in April 2002.

tion for September 11 detainees in SENTRY, the BOP's inmate tracking database, but the Group 155 assignment continued to apply to the detainees. After October 31, when MDC staff at the front reception area searched for a September 11 detainee in SENTRY, a warning message referred to the detainee as a "SPECIAL SIS CASE." The staff was therefore alerted to contact the MDC's Special Investigative Supervisor (SIS), who determined whether the visitor had been cleared to meet with the detainee.

However, problems persisted even after this second re-classification because of the BOP's initial decision to classify September 11 detainees as WITSEC inmates. As late as March 1, 2002, the Captain of the ADMAX SHU e-mailed the MDC Warden and officials at BOP Headquarters requesting that September 11 detainees no longer be categorized as WITSEC inmates in the SENTRY system.[85] According to the Captain, the WITSEC designation was unnecessary and caused "confusion . . . at times attorneys are being turned away."

B. MDC's Special Housing Unit (SHU)

Because of the policy that all September 11 detainees were to be held in the most restrictive conditions at BOP facilities, they were placed in the MDC's Special Housing Units (SHU). In BOP institutions, SHUs are designed to segregate inmates who have committed disciplinary infractions or who require administrative separation from

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[85] The Captain is the highest-ranking correctional officer with direct responsibility for custody operations in the ADMAX SHU. The Captain reports to the Associate Warden for Custody, who reports to the MDC Warden.

the rest of the facility's population.[96] According to BOP regulations, an employee called the Segregation Review Official is required to review the status of each inmate housed in the SHU on a weekly basis after the inmate has spent seven days in disciplinary segregation or administrative detention. In addition, that official is required to conduct a formal hearing every 30 days to assess the inmate's status.[97]

We found that the BOP did not review the status of each September 11 detainee on a weekly basis and did not conduct formal hearings monthly to assess the detainee's status. Rather, it relied on the FBI's assessment of "high interest." We reviewed the monthly SHU reports for the September 11 detainees we interviewed and found that each was annotated with the phrase "continue high security." MDC officials told the OIG that, if they did not receive notification from BOP Headquarters that the FBI had cleared a September 11 detainee, the detainee's monthly report was automatically annotated with the phrase "continue high security," without a hearing being conducted, and the detainee remained in segregation.

In addition, the September 11 detainees were housed in the most restrictive type of SHU—an Administrative Maximum (ADMAX) SHU. According to BOP officials, ADMAX units are not common in most BOP facilities because the conditions of confinement for disciplinary segregation or administrative detention in a normal SHU

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[96] BOP Program Statement 5270.07, Discipline and Special Housing Units.

[97] The 30-day review is documented on the BOP Special Housing Review form.

are usually sufficient for correcting inmate misbehavior and addressing security concerns. An ADMAX SHU has more restrictive conditions than a normal SHU. For example, the ADMAX SHU at the MDC, unlike a regular SHU, has a four-man hold restraint policy, handheld cameras recording detainee movements, cameras in each cell to monitor detainees, and physical security enhancements.[28]

Conditions in the ADMAX SHU differ markedly from conditions in the MDC's general population. In the general population, inmates are allowed to move around the unit and use the unit's telephones. They also are not subjected to the movement and restraint policies enforced in the ADMAX SHU. In addition, detainees in the general population are permitted certain electronic equipment in their cells, such as small radios.

By contrast, as we describe below, detainees in the ADMAX SHU are restricted to their cells, have limited use of telephones with strict frequency and duration restrictions, and can only move outside their cells for specific purposes and while restrained and accompanied by MDC staff. Several September 11 detainees who spent time in the ADMAX SHU before being moved to the MDC's general population described the difference as "between night and day."

Prior to September 11, 2001, the MDC had a SHU, but not an ADMAX SHU. After the September 11 terrorist attacks, MDC staff contacted staff from the BOP's Metropolitan Correctional Center (MCC) in Manhattan for

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[28] The structure and policies of the MDC's ADMAX SHU are discussed in more detail later in this chapter.

assistance in establishing an ADMAX SHU.[99] The MDC quickly created an ADMAX SHU from one part of its existing SHU. This ADMAX SHU was only partially operational when the first September 11 detainees arrived on September 14, 2001. According to MDC officials, the unit became fully operational by October 15, 2001, when MDC management distributed operating procedures to staff assigned to the ADMAX SHU.

Each wing has 31 cells and a capacity of 60 inmates per wing. The wings are divided into two blocks of cells called "ranges." September 11 detainees were housed in individual cells in the SHU range that was converted to an ADMAX SHU. As more detainees were transferred to the MDC, two and at times three detainees were housed in a single cell in the ADMAX SHU. MDC staff told the OIG that as many as 60 detainees were housed in the ADMAX SHU at one time.

In an effort to improve security, the MDC also initiated a series of structural changes to the ADMAX SHU in early October 2001 that were completed in mid-November 2001. The changes included:

- Heavy iron grillwork was installed between the SHU area housing September 11 detainees and the area housing inmates in other SHU ranges;
- Two stationary security cameras were installed in each ADMAX cell, each mounted on the wall at ceiling height. The MDC previously had installed cameras for viewing the range hallway

[99] The MCC in Manhattan had created an ADMAX SHU after one of its correctional officers was seriously injured by a terrorist housed in the MCC's regular SHU who had been convicted of involvement in the 1998 embassy bombings in Kenya and Tanzania.

in front of the SHU cells. Monitors for viewing the cameras in the corridors and the new cameras installed in the cells were located in the officer-in-charge's room; and

- A video camera mounted on a tripod or held by an MDC staff member was used to record all movement of September 11 detainees. Video recording equipment, linked to the stationary cameras in the cells, was located in a locked room adjacent to the ADMAX SHU.

The cells in the ADMAX SHU contained a set of bunk beds, toilet and sink fixtures, a shower, and a small seating area.

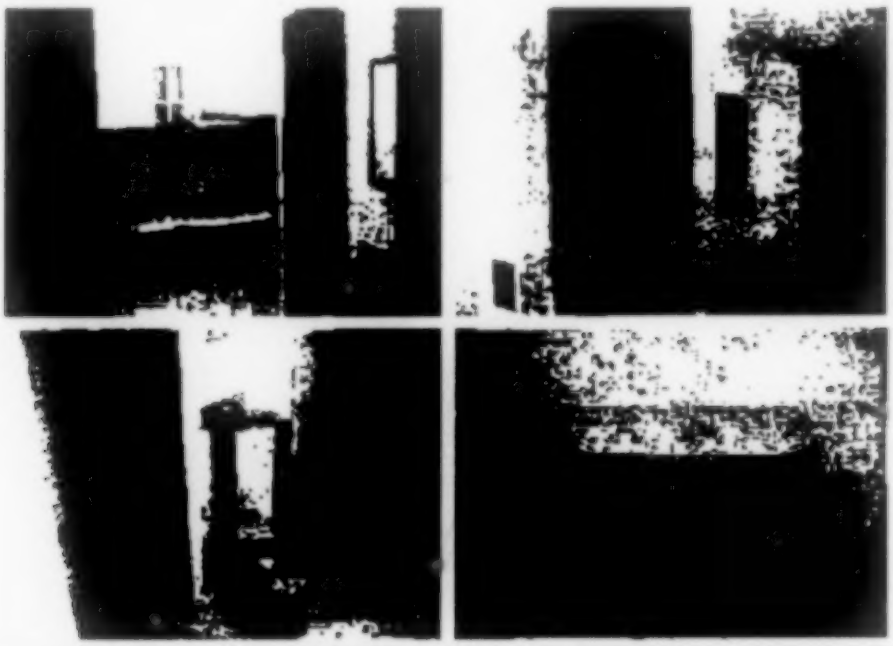


Image 1: These pictures depict a typical ADMAX SHU cell and show (moving clockwise from top left) the bunk bed, shower, seating area, and combination toilet and sink fixture. *Photographs dated May 1, 2002.*

Detainees and MDC staff used a multipurpose room located at the end of the ADMAX SHU range for medical

examinations, strip searches, recreation, and individual meetings.



Image 2: This picture shows a multipurpose room on the ADMAX SHU range that is equipped for detainee medical examinations. Photograph dated May 1, 2002.

A modified food preparation area was located between the ADMAX range and the regular SHU ranges on the MDC's ninth floor. Normally, inmate food at the MDC is served on hard plastic trays, but food for the September 11 detainees was transferred to foam plates to prevent the detainees from using plastic trays as weapons.

The recreation area in the ADMAX SHU consisted of four cell bays enclosed by chain link fencing on all sides and the ceiling. The roofs of the four recreation cells, located on the top floor of the MDC, were open to the outside. Due to security concerns, MDC staff did not provide recreation equipment to September 11 detainees housed in the ADMAX SHU.

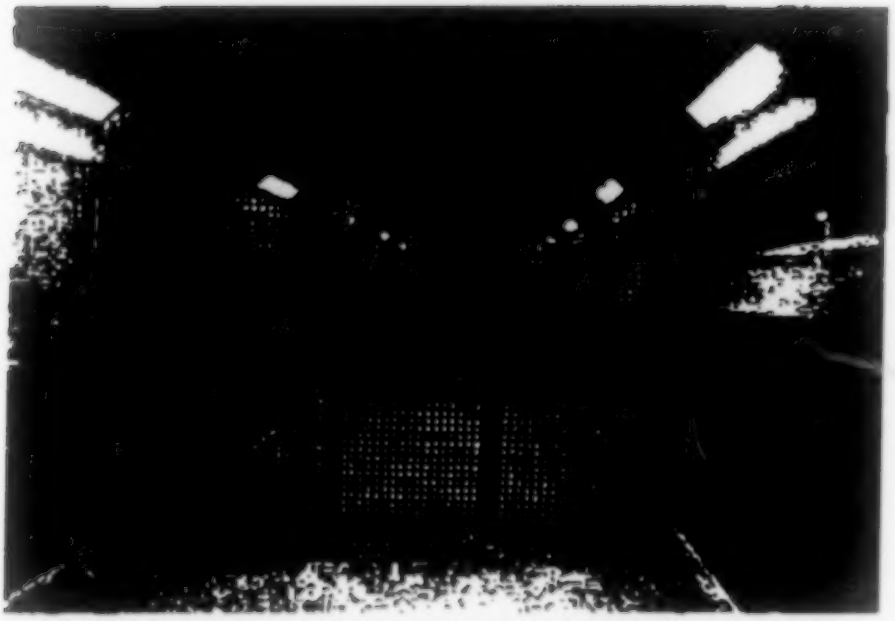


Image 3: This picture shows the ADMAX SHU recreation cells as viewed from the last recreation cell. Photograph dated May 1, 2002.

Visitors, attorneys, and family members met with September 11 detainees in a special visitation area adjacent to the ADMAX SHU range. All visits between detainees and their attorneys or family were "non-contact," meaning physical contact between parties was prevented by a clear partition. Correctional officers were not present in the special visitation areas during these visits.

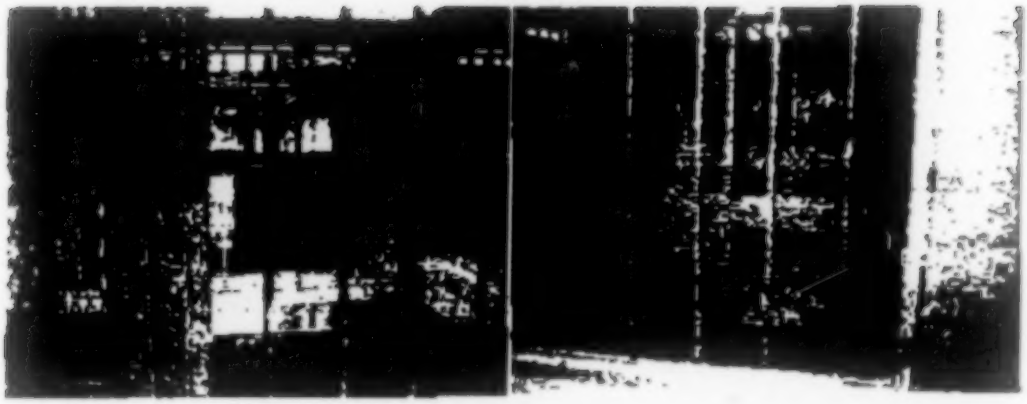


Image 4: These photographs show two views of the non-contact visiting area used by September 11 detainees in the ADMAX SHU. Photographs dated May 1, 2002.

Law enforcement visitors to the ADMAX SHU were permitted contact visits with September 11 detainees in a separate visiting area across from the non-contact area.

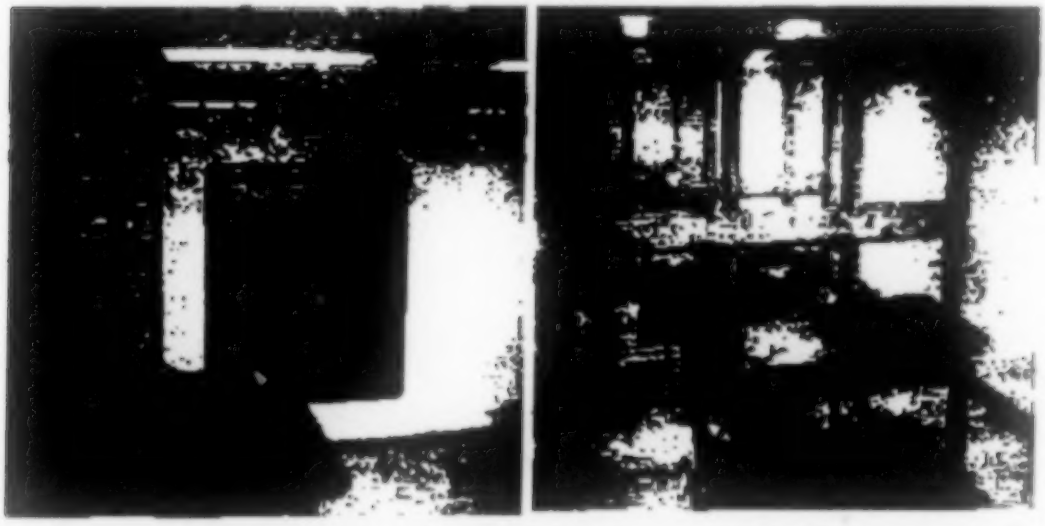


Image 5: These pictures show two views of the contact visiting area in the ADMAX SHU. Photographs dated May 1, 2002.

C. ADMAX SHU Policies and Procedures

Officials at the MDC combined existing BOP policies for disciplinary segregation and administrative detention

to create policies and procedures governing September 11 detainees housed in the ADMAX SHU.[100] The following procedures were implemented for these detainees on September 20, 2001:

- One social telephone call a month;
- One legal telephone call a week;
- A correctional counselor was required to stand in front of the cell while detainees completed all telephone calls (according to BOP officials, this was done for security purposes and not in an effort to monitor the detainee's conversation);
- All requests to use the telephone had to be made using a "copout" form, which we describe below;
- Legal and social visits, except by law enforcement officers, were non-contact;
- Detainees remained in restraints while out of their cells. The MDC imposed three different restraint policies on the September 11 detainees:
  - Routine escort: handcuffs and leg irons;

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[100] Disciplinary segregation has more restrictive conditions than administrative detention. For example, an inmate in disciplinary segregation is entitled to one social telephone call a month, while an inmate in administrative detention is entitled to one social telephone call a week. Administrative detention is considered non-punitive and is used to house either inmates who pose a threat to themselves or facility staff, or inmates in protective custody. According to BOP Program Statements, administrative detention is designed for short periods of time unless the inmate requires long-term protection or presents "exceptional circumstances, ordinarily tied to security or complex investigative concerns."

- When required to sign forms, be interviewed, or for visitation: handcuffs, leg irons, and "Martin Chain" (approximately four feet of heavy chain that links the leg irons to the handcuffs);
- When escorted from the institution: handcuffs, handcuff cover with padlock, Martin Chain, and leg irons.

- Three staff members and one Lieutenant were present each time a detainee was placed into restraints and escorted from a cell. During this "four-man hold," one of the staff members was required to operate the portable video camera; and
- Detainees remained in restraints during non-contact visits with attorneys or family members.

D. Detainee Complaint Process

September 11 detainees had two methods to make a request or file a complaint about their treatment or conditions at the MDC—the "copout" and the Administrative Remedy Program. The copout, a process in which detainees identify concerns to MDC staff, was the primary method for detainees to request telephone calls (social and legal), medical care, or resolution of visitation problems.[101] The copout, while not an official complaint process, was used by detainees to request staff assistance for a variety of issues.

In contrast, the Administrative Remedy Program is the BOP's formal process for filing a complaint, such as

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[101] BOP Program Statement 5511.07, Inmate Request to Staff.

an allegation of physical or verbal abuse against facility staff. Detainees (or inmates) are expected to exhaust all informal methods for resolving their concerns, such as submitting copouts, before filing complaints under the Administrative Remedy Program.[102]

IV. Housing Assignment Of September 11 Detainees

A. Assignment of September 11 Detainees to the ADMAX SHU

As described above, the MDC did not follow the BOP's inmate security risk assessment procedures for determining where to house the September 11 detainees. Instead, MDC officials relied on the FBI's assessment that the detainees generally were "of high interest" to its ongoing terrorism investigation and automatically placed them in the MDC's most restrictive housing conditions—the ADMAX SHU.

The first September 11 detainees arrived at the MDC on September 14, 2001. Initially, Dennis Hasty, the MDC Warden at the time, and the former Associate Warden for Custody told us they were under the impression that the MDC would be asked to house only about 16 September 11 detainees, the capacity of one block of SHU cells if each detainee was housed individually.[103] However, the number of September 11 detainees sent to the MDC soon exceeded their original expectations as

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[102] BOP Program Statement 1330.13, Administrative Remedy Program.

[103] A 17th cell along the block was used for isolation purposes (*e.g.*, an inmate on suicide watch). This isolation cell had bars traversing the front of the cell so that correctional staff could view the occupant at all times. Each of the other 16 SHU cells had a solid door with a small window.

the FBI arrested additional aliens and classified them "of high interest." At the time, the MDC was the only detention facility in New York City operational and suitable for housing detainees under highly restrictive conditions.[104]

Officials from the BOP's Northeast Region and BOP Headquarters told MDC staff that they believed that September 11 detainees who were sent to the MDC were "suspected terrorists." However, as discussed previously, from our interviews and document reviews we determined that the FBI did not have a formal process for making an initial assessment of a detainee's possible links to terrorism, and this assessment lacked specific criteria and was applied inconsistently. The BOP's Northeast Region Counsel explained to the OIG that the BOP accepted this assessment, since the BOP normally takes "at face value" FBI determinations that detainees had a potential nexus to terrorism and therefore were "high-risk."

Under standard BOP practice, newly arrived inmates are kept separate from an institution's general inmate population for the first 30 days while staff conducts risk assessments to determine whether the inmates can be released safely into the general population. We found no evidence that MDC staff performed any of the normal risk assessments on the September 11 detainees, because the detainees were assigned automatically to the ADMAX SHU.

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[104] The MCC in Manhattan had an ADMAX SHU. However, because of security and logistical concerns associated with its proximity to the World Trade Center, the MCC did not accept new inmates during the weeks after the attacks.

B. Reassigning September 11 Detainees to the General Population

We found that even after September 11 detainees who had been placed in the ADMAX SHU were finally "cleared" by the FBI, some remained in the ADMAX SHU for days or weeks after they were supposed to be transferred to the MDC's less restrictive general population.

1. Centralizing the Notification Process

As discussed in Chapter 4, prior to October 1, 2001, the FBI New York Field Office and the INS New York District Office developed their own procedures to clear local September 11 detainees using staff who served on the New York Joint Terrorism Task Force (JTTF). When the FBI liaison to the New York JTTF told the INS and BOP liaisons that the FBI had no further investigative interest in a particular detainee, the BOP liaison drafted a clearance memorandum to the MDC Warden or Captain. When the Warden received this memorandum, the detainee could be "normalized" (*i.e.*, released to the general population).[105]

However, this process did not occur quickly, even after the FBI cleared the detainee. According to the OIG's data analysis, before October 2001, the MDC received notification that the FBI had cleared a September 11 detainee an average of 15 days after the FBI's New York Field Office had actually cleared the detainee.

On October 1, 2001, the process for transferring the detainees from the ADMAX SHU to the general population was centralized to BOP Headquarters in Washing-

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[105] A copy of such a memorandum is attached as Appendix J.

ton, D.C. Under the new process, the FBI's New York Field Office informed FBI Headquarters that a detainee was no longer of investigative interest to its terrorism investigation. Subsequently, staff in the International Terrorism Operations Section at FBI Headquarters coordinated CIA checks for detainees before issuing clearance memoranda.

The BOP employee who served as a liaison to FBI Headquarters during this period told the OIG that he generally checked with the FBI on a daily basis for new clearance memoranda for September 11 detainees.[106] The liaison said that once a clearance memorandum was issued, he notified the Intelligence Section at BOP Headquarters, either by e-mail or in his weekly report, that the FBI had cleared a specific September 11 detainee. Staff in BOP's Intelligence Section then prepared a memorandum from Cooksey, the BOP's Assistant Director for Correctional Programs, to the Warden of the BOP institution in which the detainee was held. The "Cooksey memorandum," as it became known, formally notified a BOP Warden that a detainee was no longer considered "high risk" and that his conditions of confinement could be normalized.

After the FBI and BOP implemented this centralized process, the time it took for a BOP facility to receive notice that an inmate was no longer considered "high risk" lengthened. Our analysis found that the MDC received notice from BOP Headquarters, via a Cooksey memo-

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[106] The BOP liaison stated that he checked with the FBI daily until the end of April 2002, by which time the number of September 11 detainees held in BOP facilities was drastically reduced. The liaison said that starting in May 2002 he monitored the issuance of FBI clearance memoranda once or twice weekly.

randum, an average of 32 days after the FBI New York Field Office had cleared a September 11 detainee. The range of these cases varied from a minimum of 7 days after the FBI New York Field Office's clearance for one detainee to 109 days for another detainee.

BOP officials told us that they would not transfer a September 11 detainee to an institution's general population prior to receiving the FBI clearance notification via the Cooksey memorandum. We found inconsistencies in this policy, which we discuss in the next section. Moreover, BOP officials explained that the process to transfer an inmate to the general population after receiving clearance could take several days. The Cooksey memorandum permitted the MDC to assess detainees using normal BOP policies to place them in appropriate housing. After receiving a memorandum on a particular detainee, the MDC conducted its own assessment of the detainee, and BOP officials said it took time to review records and interview correctional officers as part of this assessment. BOP officials told us that they were aware of two detainees who unintentionally were left in the ADMAX SHU after the MDC received the Cooksey memorandum, due to administrative errors. They also stated that they were aware of a third detainee who received a Cooksey memorandum but remained in the ADMAX SHU because of disciplinary problems.

The efficiency of the FBI clearance process and the length of time it took BOP Headquarters to notify the MDC of a detainee's clearance were significant because they dictated when a September 11 detainee could be released to the MDC's general population, where detention conditions were markedly less restrictive.

2. Inconsistencies in Detainee Reassignment Procedures

We also found that the MDC inconsistently applied the Cooksey memorandum process for transferring September 11 detainees from the ADMAX SHU to the general population. Of the 53 detainees in our MDC sample, 23 received Cooksey memoranda; 20 never received Cooksey memoranda; and 10 were cleared using the local procedures in effect prior to centralization of the process at FBI and BOP Headquarters on October 1, 2001. Of the 20 detainees who never received Cooksey memoranda, 14 were transferred from the MDC,[107] 5 were released into the general population without FBI clearances,[108] and 1 was released on bond.

Our analysis of the 23 detainees in our MDC sample who received Cooksey memoranda determined that FBI Headquarters took an average of 107 days to clear the detainees of any connection to terrorism, and the MDC received this notification an average of 24 days after the detainee was actually cleared by FBI Headquarters.[109]

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[107] Detainees removed from the institution were returned to INS custody, transferred to another BOP institution, or removed from the United States. One detainee in our sample was released on bond.

[108] We asked MDC management for an explanation for why detainees were released into the general population without FBI clearances. They were unable to provide an explanation.

[109] The time it took the MDC to release the inmate into the general population, after the FBI clearance was received, ranged from 5 to 119 days in our sample. In the 119-day case, the detainee had entered the MDC on October 4, 2001, and was cleared by the FBI on December 19, 2001. However, he was not released to the MDC's general population until April 17, 2002. According to Warden Zenk, the detainee's continued confinement in the ADMAX SHU for 119 days after he was cleared by the FBI "was due to an administrative

In response to OIG questions, BOP management offered no explanation for why it took, on average, more than one month to issue Cooksey memoranda after the FBI had cleared the September 11 detainees.

Our analysis of the records of the 23 detainees who received a Cooksey memorandum showed that 4 of the 23 detainees were released into the general population prior to a Cooksey memorandum being received. Further, three of these four detainees did not have FBI clearances prior to being released into the general population. While it is possible that the MDC could have learned that a detainee had been cleared by the FBI from a source other than a Cooksey memorandum, such deviation from the standard procedure is noteworthy given the BOP's adherence to other rules developed to ensure that the September 11 detainees did not present a risk to the facility's staff or other inmates.

Case Study 1:

A September 11 detainee arrested in New York City arrived at the MDC on November 5, 2001. More than six months later, on May 16, 2002, the FBI officially determined that the detainee was of "no investigative interest" regarding the September 11 attacks or terrorism in general. However, a BOP Intelligence Liaison in the SIOC at FBI Headquarters wrote that "due to an internal FBI admin[istrative] error," notification from the FBI to the BOP that the detainee had been cleared was not received by the BOP until June 13, 2002.

The Cooksey memorandum for this detainee issued by

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error" on MDC's part and was uncovered after BOP Headquarters performed an audit of September 11 detainees.

BOP Headquarters arrived at the MDC on June 14, 2002. The detainee was released into the MDC's general population later that same day, more than seven months after his arrest and almost one month after the FBI had cleared him.

V. Access To Legal Counsel

This section examines the access to counsel afforded September 11 detainees while housed in the MDC. We focus on the policies and procedures implemented by the MDC that affected these detainees' access to counsel. We also examine how the MDC's initial communications blackout and the detainees' WITSEC classification affected the availability of legal calls, access to pro bono attorney lists, and the ability of their attorneys to meet with them.

A. Legal Telephone Calls

We found that the BOP's decision to house September 11 detainees in the most restrictive confinement conditions possible severely limited the detainees' ability to obtain, and communicate with, legal counsel.

Under applicable BOP policies, MDC officials had significant discretion to determine the frequency and length of the detainees' legal telephone calls. Yet, we found that the MDC adopted procedures for September 11 detainees more appropriate for pre-trial inmates who had obtained counsel prior to their detention, rather than for individuals like the September 11 detainees, the vast ma-

jority of whom had no legal representation upon arriving at the MDC and needed to secure counsel.[110]

The BOP's national policy on attorney telephone calls states that inmates should be afforded the opportunity "to place an occasional unmonitored call to his or her attorney . . . frequent calls should be allowed only when an inmate demonstrates that communication with his or her attorney by other means is not adequate." BOP regulations do not specify an acceptable number of inmate legal telephone calls, nor does the policy define what level of attorney communication is "not adequate."[111] MDC officials told us that in accordance with BOP Headquarters's instructions to maintain the tightest restrictions possible on the September 11 detainees, they decided to adopt a practice of permitting detainees one legal telephone call per week. The MDC's legal call practice did not violate any BOP policy because, given the absence of existing written guidance from BOP Headquarters, MDC management was given broad discretion to develop and implement a facility-specific legal call policy for the detainees.

MDC unit managers and counselors controlled the process for placing legal telephone calls for detainees housed in the ADMAX SHU. Detainees who wanted to make a legal call had to submit a written request known

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[110] For example, the BOP has no national policy regulating the number or length of telephone calls that inmates in an ADMAX SHU can make to their attorneys. Neither BOP Headquarters nor the MDC developed new policies addressing the unique needs of September 11 detainees regarding telephone access to allow them to obtain attorneys or place legal calls.

[111] An exception in the written policy is when the inmate or the inmate's attorney demonstrates an imminent court deadline.

as a "copout." A unit counselor described the process for placing legal telephone calls in the ADMAX SHU once a September 11 detainee submitted a copout:

- The counselor or unit manager plugged a telephone into an unmonitored line outside of the detainee's ADMAX SHU cell;
- The detainee provided the MDC employee with a telephone number, which the counselor or unit manager dialed and verified that the unmonitored call was placed to the detainee's attorney;
- The counselor passed the telephone to the detainee through the horizontal slot in the cell door; and
- The counselor remained at the cell door until the detainee completed his call.

In addition to the written copout process, our interview with the ADMAX SHU unit counselor and our review of the MDC Legal Call Log revealed that the unit counselor made rounds to offer legal calls to September 11 detainees, at the most, 2 to 3 times per week. In fact, our review of the Legal Call Log and copout records revealed that between September 17, 2001, and April 3, 2002, there were six periods of over seven days in which the counselor did not make rounds in the ADMAX SHU to offer detainees the opportunity to place legal calls. Three of these periods were between September 17, 2001, and January 2, 2002, and lasted 28, 16, and 8 days. The other three periods were between January 8 and April 3, 2002, and lasted 20, 16, and 8 days.

Three September 11 detainees interviewed by the OIG said that each time the unit counselor made rounds through the ADMAX SHU he simply asked detainees

"are you okay?" The three detainees said that, initially at least, they did not realize that this question was shorthand for, "Do you want a weekly legal telephone call?" A unit counselor confirmed to the OIG that when he made rounds through the ADMAX SHU to provide legal calls, he asked the September 11 detainees, "Are you okay?" to determine whether they wanted to make legal calls. Detainees we interviewed reported that an affirmative response to the question of whether they were "okay" resulted in them not receiving a legal telephone call that week.

The Associate Warden for Programs, the ADMAX SHU unit manager, and a unit counselor told us that if a detainee declined an opportunity to make a legal call, this refusal was not always recorded in the MDC's Legal Call Log. Our analysis also found that legal call refusals were not consistently annotated in the log. The Associate Warden said that the unit counselor prepared a weekly memorandum that listed the names of the detainees who refused legal calls that week.

We analyzed the weekly legal call memoranda, the Legal Call Log, and copouts for legal calls submitted by the 19 September 11 detainees we interviewed at the MDC. The first legal call made by any September 11 detainee, according to these three sources, was not until October 15, 2001.[112] Yet, the MDC was notified via confer-

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[112] In order to assess the placement of legal calls by September 11 detainees, we requested the telephone records for the unmonitored telephone lines used by the detainees in the ADMAX SHU. The telephone company stated that it could not isolate telephone line extensions within the MDC. Additionally, MDC Warden Zenk informed us that the MDC telephone system did not have the capacity to retrieve the detainees' telephone records that we requested. There-

ence call by the BOP Northeast Region that legal telephone calls could be made by detainees as of September 20, 2001.

Based on the length of time spent in the ADMAX SHU, the 19 detainees we interviewed collectively should have been offered 383 opportunities to make legal phone calls. The Legal Call Log lists 200 legal calls made by these detainees.[113] We also reviewed 60 memoranda with the names of detainees who declined their legal calls and 27 copouts for which there are no corresponding entries in the log. We concluded that, at best, detainees in our sample were offered 287 legal telephone calls, far less than one legal call per detainee per week.

The detainees we interviewed also stated they were not always offered weekly legal calls. Seven of the 19 September 11 detainees we interviewed stated that they did not complete legal telephone calls and were not visited by attorneys from the time they arrived at the MDC in mid-October until mid- December 2001. When detainees began placing legal calls from the ADMAX SHU in mid-October 2001, 15 of the 19 detainees we interviewed told the OIG they were permitted, at most, one legal telephone call per week. Three detainees told us that they never were offered legal telephone calls, and one detainee stated that he was denied legal calls as part of disciplinary punishment. A review of the Legal Call Log indicates that this particular detainee placed one legal call during the month he spent in the ADMAX SHU.

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fore, we were not able to independently verify the information in the MDC Legal Call Log or on the legal call copouts.

[113] We obtained corresponding copouts for 123 of the legal calls.

Fourteen of the 19 detainees were not offered their first legal phone calls within 7 days of arrival at the MDC. Of this group of detainees, the earliest legal phone call was offered ten days after arrival. One detainee was not offered his first legal phone call until 42 days after arrival. The average time from arrival to the first offer to make a legal phone call for the 14 detainees was 17 days.

We found that of the 287 legal telephone calls offered, 101 (37 percent) were offered more than seven days apart. In response to this finding, the MDC unit counselor said he offered weekly legal calls and the detainees' statements to the contrary were inaccurate.

Even when MDC offered detainees telephone calls, the MDC's response to unsuccessful attempts to contact attorneys by telephone was arbitrary. Four of the 19 detainees we interviewed told the OIG that legal calls resulting in a busy signal or calls answered by voicemail counted as their one legal call for the week. In addition, six detainees told the OIG that their calls to attorneys on the pro bono attorney list that resulted in no answer, were a wrong number, or resulted in a refusal to provide legal services counted as the detainees' legal call for that week. The unit counselor disputed these claims, stating that a "no contact" or busy signal did not count against the detainee as his sole weekly legal call. The unit counselor told the OIG that if the line was busy or the call could not be placed for some other reason, he tried to provide another legal call to the detainee the next time he made rounds in the ADMAX SHU. Yet, the Legal Call Log, which lists 200 total calls for September 11 detainees, indicates at least four instances when a "no contact" or busy signal counted as a detainee's weekly legal call. Moreover, the Associate Warden for Programs, the AD-

MAX unit manager, and a second unit counselor acknowledged to the OIG that reaching an answering machine counted as a completed legal call, although encountering a busy signal did not. This meant that for some detainees, if they reached an answering machine while trying to obtain an attorney during their one weekly telephone call, they would not be permitted another legal call for a week.

Also, according to six September 11 detainees we interviewed, unit counselors unilaterally hung up the telephone when a detainee's legal call lasted longer than three minutes. The ADMAX SHU unit counselor denied this allegation and stated that he did not limit the length of detainees' legal calls. The Legal Call Log, which is supposed to track the length of detainee legal calls, shows most calls lasting at least 5 minutes, with the longest call noted as 34 minutes.

In late November 2001, at least 20 September 11 detainees at the MDC staged a hunger strike to express dissatisfaction with their confinement and the conditions in the ADMAX SHU, including the restrictive telephone policies. Four of the 19 September 11 detainees we interviewed said they refused food beginning in late November 2001 to protest a lack of attorney telephone calls, among other issues. A daily ADMAX SHU report filed on November 28, 2001, confirmed the hunger strike, and noted that 20 of the September 11 detainees were refusing to eat, in part because of concerns about limited legal telephone calls.[114]

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[114] We discuss detainee hunger strikes at the MDC in greater detail in Section VII of this chapter.

Case Study 2:

We interviewed a September 11 detainee at the MDC who was arrested on September 26, 2001. He said he was originally arrested after the New York JTTF executed a search warrant for his apartment. He was suspected of social security fraud, insurance fraud, and credit card fraud. He also was suspected of working with others in a scheme to provide funds to al Qaeda. He was immediately transferred to INS custody and spent approximately one day at the INS Varick Street Service Processing Center. He told us he was never informed as to why he was arrested but said he later pleaded guilty to marriage fraud.

Based on the Legal Call Log, the detainee was not offered a legal call until October 15, 2001. That call was listed as a completed 10-minute call. According to the Legal Call Log, the detainee was not offered his next legal call until November 7, 2001, which the ADMAX SHU Counselor recorded as being refused by the detainee. The log showed that on December 17, 2001, the detainee made his next legal call, the result of which was an incomplete "no answer." This detainee refused three legal call offers in January 2002, according to weekly memoranda that recorded the detainees who did not wish to make a legal call.

The detainee told us that he was given a pro bono attorney list by MDC staff in October 2001. He stated that he tried to contact several legal services providers on the list, but received no responses when he called the numbers listed. He denied being offered the opportunity to make a legal phone call in November 2001. The detainee also stated that he was not allowed to make a social call to his sister for the first three months he was incarcerated at the MDC. He said that

in December 2001, he finally contacted his sister and that by mid-January 2002, his sister had obtained legal representation for him, approximately four months after he entered the MDC.

B. Attorney Visits

The BOP's classification of September 11 detainees as WITSEC inmates also hampered their ability to visit with attorneys long after the MDC lifted its initial communications blackout. Even though MDC officials developed procedures to permit meetings between detainees and their attorneys in the ADMAX SHU, the continuing confusion on the part of MDC staff who interacted with attorneys about the location of detainees made the attorneys' ability to visit their clients more difficult.

The first attorney visit recorded for a September 11 detainee at the MDC took place on September 29, 2001. The next two attorney visits for different detainees were noted on October 10, 2001. According to the Associate Warden for Programs, the MDC did not allow September 11 detainees any visitors for about three weeks after the terrorist attacks. During this communications blackout period, MDC staff told attorneys who sought to visit September 11 detainees that information on the detainees was not available. Instead, MDC staff referred the attorneys to the BOP's National Locator Service, which, as we discussed previously, contained no information about September 11 detainees due to their WITSEC classification.

By the end of the first week in October 2001 (after the communications blackout was lifted), the MDC instituted the following new screening procedures to determine

whether attorneys could meet with September 11 detainees:

- MDC staff referred an attorney seeking to visit a September 11 detainee to the Associate Warden for Programs;
- The Associate Warden called an Assistant United States Attorney to verify the credentials of the lawyer requesting to visit a detainee in the ADMAX SHU;
- The Associate Warden contacted the attorney to verify that the attorney represented a specific detainee or wanted to meet with a certain detainee to discuss representation; and
- If the attorney met the above criteria, the Associate Warden prepared a memorandum approving the attorney's visit, which she sent to staff stationed at the MDC's front desk. This approval for visitations by the Associate Warden also was effective for future visits by the attorney to the same detainee.

When an attorney seeking to visit a September 11 detainee arrived at the MDC and provided the name of his or her client, the desk officer checked two lists which were updated daily: a general, sanitized roster of all MDC inmates that did not include WITSEC/Group 155 inmates, and a list of "separatees"—inmates who had been separated from the general population for a variety of reasons. However, the Associate Warden for Programs, the MDC Captain, and MDC reception area staff told the OIG that the September 11 detainees were not on either list. Instead, their names were kept on a third list maintained elsewhere in the MDC in order to control access to the information. This list was not kept at the

MDC reception area. Therefore, if an attorney asked about a detainee whose name was not on either of the two daily lists available to the officer at the front desk, and the attorney had not obtained prior approval for visits from the Associate Warden, the desk officer told the attorney that the detainee was not present at the facility (when, in fact, the detainee may have been incarcerated in the ADMAX SHU).

Five New York-area attorneys told us that they were unable to meet with their September 11 detainee clients for many weeks because MDC staff told them that their clients were not housed at the MDC. Four of the attorneys each represented one detainee and one attorney represented several MDC detainees. According to the attorneys, they were not permitted to visit their clients during the second week of November 2001, and the first weeks of December 2001, February 2002, and March 2002. The attorneys said they were turned away either over the telephone or when they showed up at the MDC. According to the attorneys, no MDC officials mentioned any clearance procedure they needed to follow in order to visit their clients.

Eventually, these attorneys did gain access to their clients, and by the time of our May 2002 site visit to the MDC, all of the attorneys we interviewed said they were not having problems obtaining access to their clients at the MDC.

C. Pro Bono Attorney List

As noted above, most of the September 11 detainees had not hired attorneys before entering the MDC and, consequently, needed to solicit legal representation when initially incarcerated in the MDC. For example, 17 of the 19 September 11 detainees we interviewed said they did not have attorneys when they arrived at the MDC. The

remaining two detainees had retained attorneys during their stays at other detention facilities before they were transferred to the MDC.

We found that the INS did not consistently provide September 11 detainees with lists of attorneys who would take immigration clients without compensation (known as "pro bono" cases). Several of the detainees we interviewed said that they did not receive the pro bono lists until days or months after their arrival at the MDC.[115] We also found that the lists they eventually received contained significant inaccuracies, including wrong telephone numbers and numbers for attorneys who were unwilling or unable to take the September 11 detainees as clients because they only handled immigration asylum claims.

As stated previously, the BOP classified the September 11 detainees as pre-trial inmates. The BOP has no policy that requires its staff to provide lists of pro bono attorneys to pre-trial inmates arrested by the INS. On the other hand, federal regulations specify that INS officers who processed the September 11 detainees after they were arrested were responsible for providing the detainees "with a list of the available free legal services . . . located in the [INS] district."[116] The Executive Office

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[115] Eleven of the 19 September 11 detainees we interviewed said they received pro bono attorney lists from ADMAX SHU counselors within the first month of entering the MDC. However, four detainees stated that they did not receive the list for more than a month, and one detainee stated that he never received a pro bono attorney list. Two September 11 detainees we interviewed were unsure when they received the list, and one detainee's attorney advised him not to respond to our question.

[116] 8 C.F.R. § 287.3(c).

for Immigration Review (EOIR), part of the Department of Justice, maintains lists of pro bono attorneys who offer free legal services to immigration detainees in each INS District and distributes these lists to detention facilities holding immigration detainees.

In addition, Immigration Judges overseeing removal proceedings for the September 11 detainees also are required to, "[a]dvise [detainees] of the availability of free legal services ... located in the [INS] district."[117] The INS requires that staff members at all of its detention facilities, including contract facilities, enable detainees to make calls to attorneys on the INS-provided pro bono list.

According to the MDC's Associate Warden for Programs and the ADMAX SHU Captain, when the BOP lifted its restriction on telephone calls for September 11 detainees on October 1, 2001, MDC staff obtained a list of pro bono attorneys from the INS within a week and provided that list to detainees. However, the MDC staff we interviewed, including the Associate Warden, stated that the list contained inaccurate telephone numbers.

As described above, some detainees told us that their calls to attorneys on the pro bono list that resulted in no answer, were clearly an inaccurate number, or resulted in a refusal to provide legal services counted as the detainees' legal calls for that week. Consequently, the inaccurate pro bono attorney list affected detainees' ability to contact counsel in a timely manner. The Associate Warden and the ADMAX SHU Captain told the OIG that they obtained more accurate pro bono lists from EOIR

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[117] 8 C.F.R. § 240.10(a)(2).

and the INS between mid-October and early November 2001.

D. Social Visits

We found that BOP's classification of September 11 detainees as WITSEC/Group 155 inmates, and the resulting confusion this designation caused MDC staff, prevented or delayed many of the detainees' visits from family members.

In order to schedule a social (as opposed to an attorney) visit, September 11 detainees had to provide a list to MDC staff of which family members they wanted to be able to visit them. The same problems that attorneys encountered in attempting to visit their clients at the MDC hindered the detainees' family visits as well. Three detainees we interviewed said family members on their lists were told by MDC staff that the detainees were not housed at the MDC when, in fact, the detainees were in the facility.

As discussed previously, the BOP made changes in the detainees' classification status at the end of October 2001 after realizing that its original WITSEC/Group 155 designations were causing problems for MDC staff in handling requests for visits from detainees' attorneys and family members. The BOP also added notations in its SENTRY inmate tracking system whenever a September 11 detainee's name was queried before staff authorized a visit. The messages were designed to alert MDC staff about information that could and could not be released about these detainees (*e.g.*, "Special SIS case—do not disclose location—notify SIS of inquiry"). We found, however, that the detainees' redesignation in the BOP system did not mean that MDC staff provided better assistance to detainees' visitors. The MDC's Associate Warden for Programs told the OIG that MDC manage-

ment sought to address the social visitation problem by training reception area staff on proper procedures for granting visitation to detainee family members. However, problems persisted, as illustrated by the following case study.

Case Study 3:

One September 11 detainee was held at the MDC from October 16, 2001, until June 14, 2002. His wife said she experienced repeated problems while attempting to visit her husband. The woman, who took unpaid leave from work to travel from her home in New Jersey to the MDC, said that between October and December 2001 she was told by staff at the MDC visitors' desk that her husband was not incarcerated at the facility when, in fact, he was. When she eventually learned her husband was at the MDC, she visited him for the first time on December 19, 2001, after being granted a "special visit" by the unit manager at a date and time outside the normal visiting schedule. From January 31 to March 31, 2002, the woman said she was not permitted to visit her husband because he was being disciplined for failing to stand up for a 4:00 p.m. daily count.

The woman subsequently was permitted to visit her husband during the week of April 2, 2002. However, she was not permitted to visit her husband the week of May 1, 2002, because she arrived at the MDC on a day and at a time that MDC reception area staff told her was not the appropriate time to visit detainees held in the ADMAX SHU. The woman told the OIG that she assumed this was an appropriate time because it was the same day of the week and hour of her previous "special visit." When she contacted the ADMAX SHU unit manager about this particular visitation problem, he arranged for another "special visit" which took

place on May 4, 2002. On May 9, 2002, the detainee's wife arrived at the MDC to visit her husband but MDC staff told her that all the visitation rooms were full. She was asked to wait until after the 4:00 p.m. inmate count for a possible visit at 4:30 p.m. At 4:30 p.m., the reception staff told her to go home and call the following day. On May 10, 2002, the detainee's wife said she was unsuccessful in contacting anyone at the MDC to arrange a visit with her husband.

As of May 10, 2002, the woman had succeeded in visiting her husband three times during his more than five months of confinement in the ADMAX SHU.

E. Contact with Foreign Consulates

Similar to the problems experienced by attorneys seeking access to their September 11 detainee clients, the BOP's categorization of these detainees as WITSEC inmates inhibited the ability of consular officials to determine whether individuals from their countries were held at the MDC. Beyond that issue, however, we found that MDC staff did attempt to facilitate visits by foreign consulates that requested meetings with detainees from their countries.

The federal government's policy regarding consular access to incarcerated foreign nationals applies whether the detainees are in the custody of the BOP or the INS. Federal regulations state:

> Every detained alien shall be notified that he or she may communicate with the consular or diplomatic officers of the country of his or her nationality in the United States. Existing treaties with the following countries . . . require immediate communication with appropriate consular or diplomatic officers

> whenever nationals . . . are detained in removal proceedings, whether or not requested by the alien and even if the alien requests that no communication be undertaken in his or her behalf.[118]

According to Michael Rozos, Chief of the INS's Long Term Review Branch, INS agents who arrested September 11 detainees on immigration violations were required to inform the aliens that they had a right to contact consular or diplomatic officers from their country of nationality in the United States. Rozos acknowledged that if aliens express an interest in making such contacts, the INS is required to facilitate that request, usually by providing the detainee access to a telephone along with the number for the appropriate consulate.

INS regulations specifically provide that an alien detained by the INS "shall be notified that he or she may communicate with the consular or diplomatic officers of the country of his or her nationality in the United States." Therefore, the INS was responsible for informing the September 11 detainees of their rights to contact their consular representatives, even for those detainees who were first held at BOP facilities like the MDC. The INS uses a form to document that it asked detained aliens if they wanted to contact their consulate.[119] Of the 44 A-Files we were able to review for the September 11 detainees in our MDC sample, only 10 detainees had copies of this form in their files.

BOP policy requires that "whenever it is determined that an inmate is a citizen of a foreign country, the War-

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[118] 8 C.F.R. § 236.1(e).

[119] INS Form I-213, "Notice to Arrested or Detained Foreign Nationals Consular Notification and Access."

den shall permit the consular representative of the country to visit on matters of legitimate business. A Warden may not deny this privilege even if the inmate is in disciplinary status."[120] MDC Warden Zenk said that the MDC's role was limited to providing detainees with consular telephone calls upon their request and to facilitate detainees' meetings with consular officials after MDC staff conducted appropriate screenings of the consular officials. He said that the MDC did not have responsibility for notifying detainees' consulates about their incarcerations.

Zenk told the OIG that the MDC was not contacted by any foreign consulates about September 11 detainees in the two weeks immediately following the September 11 attacks. Zenk and the Associate Warden for Programs said that beginning in October 2001, all inquiries from consulates to the MDC were directed to the Warden's Executive Assistant, who served as the point of contact for consular representatives seeking to visit September 11 detainees at the MDC. According to Zenk, the MDC carefully screened consular personnel before permitting them to visit with September 11 detainees. He said consulates were required to submit a written request stating the name of the detainee to be visited and the names of the visiting consular officials. When the visitors were approved, the Executive Assistant or the Associate Warden for Programs forwarded a memorandum officially approving the visits to the MDC's front desk to inform MDC staff of the impending consular visit.

However, similar to the difficulty experienced by detainees' attorneys and family members seeking to meet

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[120] BOP Program Statement 5267.06, Visiting Regulations.

with them, the MDC detainees' designation as WITSEC inmates made it difficult for consulates to contact detainees who were citizens of their countries. For example, on October 9, 2001, a consular official met with five September 11 detainees at the MDC. Later that same day, the consular official tried to call the MDC Warden to discuss the detainees' cases, but was informed by an MDC employee that none of the five detainees was held at the MDC. Instead, the MDC employee gave the consular official the telephone number for BOP's National Inmate Locator, which, as discussed previously, did not contain information about the September 11 detainees.

Our review of files maintained by the Warden's Executive Assistant shows that between October 1, 2001, and May 7, 2002, the MDC received 22 requests for visits from 9 consulates regarding 24 different detainees. In addition, the Pakistani consulate made two requests to meet all Pakistani detainees housed at the MDC. Most of the correspondence in the file is annotated to indicate that a consular visit was approved or actually occurred. The exceptions were an October 24, 2001, request to visit five detainees, and a December 6, 2001, letter requesting visits with two detainees. We were unable to determine whether these consular visits took place because the letters are not annotated and the MDC did not maintain a separate list that reflected consular visits with September 11 detainees.

The MDC was not required to affirmatively notify foreign consulates that it was detaining citizens from their countries who had been arrested in connection with the September 11 terrorism investigation. BOP policy mandated only that MDC officials "permit" visits by consular officials. The overwhelming majority of September 11 detainees were nationals of Pakistan, India, Egypt, and

Saudi Arabia. The international treaties that the United States has with these countries do not require mandatory notification of the consulate when a foreign national of those countries is held in U.S. detention.

Our review of the 22 visitation requests from consulates received by the MDC from October 2001 to early May 2002 showed that only 2 of the requests were from a country (United Kingdom) that, by treaty, requires affirmative notification. While we did not determine if the INS affirmatively notified United Kingdom consular officials of these two detentions, we found that these two detainees were visited by consular officials from the United Kingdom and the MDC complied with BOP policies in facilitating consular visits for these two detainees.

VI. Allegations Of Physical And Verbal Abuse

Based on our interviews of 19 September 11 detainees and our investigation of allegations of abuse raised by several detainees, we believe the evidence indicates a pattern of physical and verbal abuse against some September 11 detainees held at the MDC by some correctional officers, particularly during the first months after the terrorist attacks. Although the allegations have been declined for criminal prosecution, the OIG is continuing to investigate these matters administratively.[121]

In this section of the report, we describe our interviews of 19 September 11 detainees during our inspection

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[121] The OIG can pursue a complaint either criminally or administratively. Many OIG investigations begin with allegations of criminal activity but, for a variety of reasons, may not result in prosecution. When this occurs, the OIG can continue the investigation and treat the matter as a case for potential administrative action. The standard of proof to prove allegations in an administrative case is less than the "beyond a reasonable doubt" standard in a criminal case.

visit in May 2002, the investigation conducted by the OIG's Investigations Division regarding specific complaints of abuse, and other allegations of abuse that were referred to the FBI or BOP for investigation.

A. OIG Site Visit

In connection with this review of the treatment of September 11 detainees, our inspection team interviewed 19 detainees who were being held at the MDC when we visited the facility in May 2002. All 19 detainees complained of some form of abuse. Twelve complained about physical abuse and 10 complained about verbal abuse. The complaints of physical abuse ranged from painfully tight handcuffs to allegations they were slammed against the wall by MDC staff. The detainees told us that the physical abuse usually occurred upon their arrival at the MDC, while being moved to and from their cells, or when the hand-held surveillance camera was turned off.

Ten of the 19 detainees we interviewed during our inspection visit alleged they had been subjected to verbal abuse by MDC staff, consisting of slurs and threats. According to detainees, the verbal abuse included taunts such as "Bin Laden Junior" or threats such as "you're going to die here," "you're never going to get out of here," and "you will be here for 20-25 years like the Cuban people." They said most of the verbal abuse occurred during intake and during movement to and from the detainees' cells.

Our inspection team interviewed 12 correctional officers about the detainees' allegations of physical abuse. All 12 officers denied witnessing or committing any acts of abuse. Further, they denied knowledge of any rumors about allegations of abuse. The correctional officers we interviewed also denied they verbally abused the detain-

ees and denied making these specific comments to the detainees.

B. OIG Investigation of Abuse

On October 30, 2001, the OIG reviewed a newspaper article in which a September 11 detainee alleged he was physically abused when he arrived at the MDC on October 4, 2001. Based on the allegations in the article, the OIG's Investigations Division initiated an investigation into the matter. When we interviewed the detainee, he complained that MDC officers repeatedly slammed him against walls while twisting his arm behind his back. He also alleged officers dragged him by his handcuffed arms and frequently stepped on the chain between his ankle cuffs. The detainee stated his ankles and wrists were injured as a result of the officers' abuse. He also identified three other September 11 detainees who allegedly had been abused by MDC staff members.

We interviewed these three other September 11 detainees. They stated that when they arrived at the MDC, they were forcefully pulled out of the vehicle and slammed against walls. One detainee further alleged that his handcuffs were painfully tight around his wrists and that MDC officers repeatedly stepped on the chain between his ankle cuffs. Another detainee alleged officers dragged him by his handcuffs and twisted his wrist every time they moved him. All three detainees alleged that officers verbally abused them with racial slurs and threats like "you will feel pain" and "someone thinks you have something to do with the World Trade Center so don't expect to be treated well."

During our investigation of these complaints, we received similar allegations from other September 11 detainees. On February 11, 2002, four September 11 detainees held at the MDC (including one of the detainees

we interviewed previously) told MDC officers that certain MDC officers were physically and verbally abusing them. Those complaints were provided to us. In interviews with our investigators, these detainees alleged that when they arrived at the MDC in September and October 2001, MDC officers forcefully pulled them from the car, slammed them into walls, dragged them by their arms, stepped on the chain between their ankle cuffs, verbally abused them, and twisted their arms, hands, wrists, and fingers. One of the detainees alleged that when he was being taken to the MDC's medical department following a 4-day hunger strike, an officer bent his finger back until it touched his wrist. Another detainee alleged that when he arrived at the MDC, officers repeatedly twisted his arm, which was in a cast, and finger, which was healing from a recent operation. He also alleged that when he was transferred to another cell in December 2001, officers slammed him into a wall and twisted his wrist.[122] One detainee claimed his chin was cut

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[122] This detainee alleged that while being transferred to another cell in the MDC in December 2001, two officers threw him against his cell wall, twisted his wrist, and placed him in the cell naked and without a blanket. The detainee claimed the officers physically abused him because he refused to clean his cell prior to the transfer. He claimed the officers' abuse left a scar on his wrist. The case was referred to the BOP, which interviewed the detainee, reviewed his medical records, and had the detainee's wrist examined. The MDC medical department did not find a scar on the detainee's wrist. The BOP also interviewed two officers alleged to have committed the abuse and a supervising officer who witnessed the detainee's transfer. All three stated that during a routine cell rotation the detainee began cursing and threatening the officers. One officer filed an incident report describing what he characterized as the detainee's insolent and threatening behavior. The three officers also stated that

open and he had to receive stitches because officers slammed him against a wall.

During our investigation, the OIG asked the detainees individually to identify the officers who had committed the abuse through photographic lineups. The detainees identified many of the same officers as the perpetrators, and the OIG focused its investigation on eight officers. The OIG interviewed seven of these officers. Six of them denied physically or verbally abusing any of the detainees or witnessing any other officer abuse the detainees. Five remembered at least one of the detainees and some of them remembered a few of the detainees. Two officers described two detainees as disruptive and uncooperative. One of the officers explained that the high-security procedures in place during the weeks following the September 11 attacks required four officers to physically control inmates during all escorts; face them toward the wall while waiting for doors, elevators, or the application and removal of leg restraints; and place them against the wall if they became aggressive during these escorts.

The seventh officer interviewed by the OIG told us that he witnessed officers "slam" inmates against walls and stated this was a common practice before the MDC began videotaping the detainees. He said he did not believe these actions were warranted. He said he told MDC officers to "ease up" and not to be so aggressive when escorting detainees. He also said he witnessed a supervising officer slam detainees against walls, but when he spoke with the officer about this practice the officer told him it was all part of being in jail and not to worry about

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they did not throw the detainee against the wall, twist his wrist, or place him in a cell naked and without a blanket.

it. The seventh officer signed a sworn affidavit to this effect. In a subsequent interview with the OIG, this officer recharacterized the action as "placing" the detainees against the wall, and said he did not want to use the word "slam." He denied that the officers acted in an abusive or inappropriate manner.

The OIG reviewed the detainees' medical records. The medical records do not indicate that most of the detainees received medical treatment for the injuries they asserted they received from officers. Two of the detainees' medical records indicate they were treated for injuries that they later claimed were caused by officers, but the medical records did not indicate that they alleged their injuries were caused by officers at the time they were treated. One detainee's records do not mention the cause of the injury and the other detainee's records state the detainee said he was injured when he fell. In his interview with the OIG, the detainee alleged his chin was badly cut when detention officers slammed him against the wall. He said that nobody ever asked him how his injury occurred. The other five detainees did not seek treatment for their alleged injuries.

Based on the scarcity of medical records documenting injuries and the lack of evidence of serious injuries to most of the detainees, the U.S. Attorney's Office for the Eastern District of New York and the Civil Rights Division declined criminal prosecution in this case. All of the detainees, with the exception of one, now have been removed from the United States. Nevertheless, the OIG is continuing its investigation of these allegations as an administrative matter. Because this case is ongoing, we are not describing in detail all the evidence in the case about the detainees' allegations. However, we believe there is evidence supporting the detainees' claims of abuse, in-

cluding the fact that similar—although not identical—allegations of abuse have been raised by other detainees, which we describe in the next section.

C. FBI and BOP Investigations of Abuse

Four cases alleging physical abuse of September 11 detainees at the MDC were referred to the FBI for investigation. Another two complaints of abuse were referred to the BOP's internal affairs office for review. As we summarize below, the FBI closed three of these cases and one FBI case remains open. The BOP closed one case due to the resignation of an employee and closed the other as unsubstantiated after conducting an investigation.

In each of the four cases assigned to the FBI, the detainee alleged that he was "slammed" against a wall or door by MDC correctional officers and was injured as a result. Two of the detainees also alleged that they were threatened by MDC correctional officers and incurred additional physical abuse, such as being kicked by officers or having the chain on their leg restraints stepped on by officers. The detainees' complaints were forwarded initially to the Department's Civil Rights Division, which after a delay in two of the cases assigned them to the FBI to investigate. In two of the cases sent to the FBI, the detainees already had been removed by the time the FBI received the complaints and were not interviewed. In another case, the detainee was removed six months after the FBI received the case, but was not interviewed. The FBI did not attempt to locate these removed detainees or to interview the correctional officers. The Civil Rights Division declined prosecution of the three cases, and the FBI subsequently closed its investigations.

In the one case that the FBI has not yet closed, the detainee complained in May 2002 that he was slammed

into a wall, unnecessarily strip searched, and physically abused by MDC officers. The FBI received the case in July 2002, and opened an investigation in September 2002. As of March 19, 2003, however, the FBI had not interviewed the detainee or any officers.

In one of the cases referred to the BOP, the correctional officer who allegedly physically and verbally abused the detainee resigned during the investigation, and as a result the BOP closed the matter without further investigation. In the other case, the BOP interviewed the detainee, reviewed his medical records, and had his alleged injuries medically examined. The medical department did not find any injuries and the detainee's medical records do not indicate any injuries around the time of the alleged abuse. The BOP also interviewed two subjects and a supervising officer who witnessed the detainee's transfer. All three officers denied abusing the detainee and stated that during a routine cell rotation, the detainee began cursing and threatening the subjects. The BOP closed its investigation as unsubstantiated.

Based on the similarity of the allegations in these FBI and BOP cases to the ongoing OIG investigation, the OIG has decided to complete the investigations of the FBI and BOP cases and incorporate the relevant allegations from these cases into our ongoing investigation.

D. Allegations of Harassment

All 19 detainees we interviewed also complained of other types of harassing behavior by MDC staff while they were housed in the ADMAX SHU, such as staff banging on their cell doors or telling detainees to "shut up" while they were praying. All 19 detainees told the OIG that MDC officers banged on their cell doors for the midnight inmate count. When we questioned MDC staff about these allegations, they told us that they were re-

sponsible for ensuring that the detainees were alive during the nightly count and that banging on the cell doors was their method of waking the detainees. We confirmed that, according to BOP Program Statement 5511.06, Inmate Accountability, "Staff conducting counts shall ensure the observance of a real person and not a 'dummy.' When conducting a count, the staff member must personally observe a living breathing human body for each inmate counted." MDC staff told us they banged on the cell door to satisfy the BOP's national policy requirement to ensure that a living human body was in each ADMAX SHU cell.[123]

September 11 detainees also told the OIG that their afternoon prayers often were interrupted by MDC officers who conducted a "stand-up count" at 4:00 p.m. daily in the ADMAX SHU. MDC officials said the detainees were informed about these daily counts, including the midnight count, in a 2-page document containing ADMAX SHU policies that each detainee was supposed to receive when he first entered the MDC. However, several detainees told the OIG that they did not sufficiently understand English or they did not realize they were supposed to stop praying for the count. Two September 11 detainees said they were disciplined for not standing up during the count by being deprived of social visits. According to MDC records, one detainee had his social visitation privileges suspended for 60 days, while another detainee had his privileges suspended for 90 days.

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[123] BOP national policy requires inmate stand-up counts at least five times per day but specifies times for only two of the counts—4:00 p.m. daily and 10 a.m. on weekends and holidays. The BOP's practice is to conduct at least one of the other counts sometime during the hours of darkness.

When we questioned MDC staff on this subject, one Lieutenant said he delayed the afternoon count until the detainees had completed their prayers. All the other Lieutenants and correctional officers we interviewed said they followed standard BOP regulations and did not delay the afternoon count to avoid interfering with detainees' prayers.

E. Reporting Allegations of Abuse

Even though the MDC has a formal process for inmates to file complaints of abuse, we found that MDC staff failed to inform the September 11 detainees about these procedures in a timely manner. As discussed previously, the Administrative Remedy Program (ARP) is the BOP's formal procedure for filing allegations of physical or verbal abuse against facility staff. While the ARP is discussed in the MDC's facility handbook, only 1 of the 19 detainees we interviewed said he received this handbook when he arrived at the MDC in October 2001. The other 18 detainees we interviewed told us that they did not learn about this complaint resolution process until they received their facility handbooks several months after their arrival at the MDC.[124]

Of the 19 detainees we interviewed, 5 who said they never received facility handbooks told the OIG that they only learned about the ARP from other detainees in the

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[124] During intake screening at BOP facilities, a facility handbook normally is provided to the inmate and prison staff annotates the inmate's intake form to reflect that the inmate has received the handbook. When we examined the intake forms for the 19 September 11 detainees we interviewed, all forms were annotated to reflect that each detainee had received a handbook, which suggested that the handbook was given to the inmate but was quickly confiscated because it was on the list of forbidden items.

ADMAX SHU. Ten detainees said they received a handbook four to six months after arriving at the MDC, while three other detainees said they received a handbook within a month of arriving at the MDC.[125] One detainee did not respond to the question about when he received a facility handbook.

All 19 detainees told the OIG that they either were informed verbally about ADMAX SHU policies or they received a 2-page explanation of the policies instead of the complete MDC facility handbook. We found, however, that this 2-page summary of MDC policies did not include a description of the ARP process.

The Associate Warden for Programs told the OIG that all September 11 detainees were provided with a handbook when they were processed into the MDC. She suggested that it was possible that correctional officers confiscated the handbook from the detainees as an unacceptable item in their ADMAX SHU cell. The two-page document, "Special Housing Unit Rules and Regulations," included a list of items that the detainees could retain in their ADMAX SHU cells. These items included certain clothing items, facility-provided linen, specified personal items, and select hygiene items. The list of permitted items did not include a facility handbook. Therefore, according to the Associate Warden for Programs, because the facility handbook was not on the list, correctional officers may have confiscated the handbook. On October 17, 2001, the MDC changed its policy to permit detainees to retain the facility handbook in their cells.

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[125] One of these three detainees said he did not receive a handbook until he was released into the MDC's general population in May 2002.

MDC officials could not explain why the detainees said that they did not receive the facility handbooks until months later. The Associate Warden also stated that some detainees might not have become familiar with the ARP process until several months after they arrived at the MDC because they did not understand English or had not read the handbook.

F. MDC Videotapes

MDC management took some affirmative steps to prevent potential staff abuse by installing security cameras in each September 11 detainee's cell in the ADMAX SHU and by requiring MDC staff to videotape all movements of detainees to and from their cells. However, the MDC's policy that permitted staff to destroy or reuse these videotapes after 30 days hindered these efforts. As a result, the OIG, MDC management, and others were unable to use the videotapes to prove or disprove allegations of abuse raised by individual detainees.

According to interviews with BOP staff, the MDC installed cameras in its ADMAX SHU cells by mid-October 2001 pursuant to a national directive issued shortly after the September 11 attacks.[126] The directive required that cameras be installed in each cell housing a September 11 detainee. According to BOP and MDC officials, the security cameras were installed because the video record could help protect BOP staff from unfounded allegations of abuse. According to an "al Qaeda Training Manual" found by police in Manchester, England, during a search

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[126] This policy was communicated by BOP Assistant Director Michael Cooksey to all BOP Regional Directors in a series of video conference calls that occurred between September 13 and September 20, 2001.

of an al Qaeda member's home, terrorists incarcerated in the United States were urged to distract Government officials by claiming mistreatment. Consequently, the BOP was concerned that specious allegations of abuse would consume valuable administrative and legal resources.

David Rardin, the former BOP Northeast Region Director, directed in an October 9, 2001, memorandum to Northeast Region Wardens (including the MDC) that any movement of a September 11 detainee outside of his cell must be videotaped. According to Rardin's memorandum, the videotape policy was intended to deter unfounded allegations of abuse made by September 11 detainees and to substantiate abuse if it occurred.

Rardin also directed that these videotapes of detainee movements and tapes of detainees in their cells were to be preserved "indefinitely." However, by December 18, 2001, after the MDC had accumulated hundreds of videotapes, Mickey Ray, Rardin's successor as the BOP's Northeast Region Director, revised the policy for retaining surveillance videotapes from "indefinitely" to 30 days, except for incidents involving use of force by BOP staff. According to instructions from Ray, tapes that showed use of force by MDC staff against detainees were to be preserved for "evidentiary use." Tapes that did not show use of force against detainees could be reused on the 31st day. Acting on Ray's new policy, MDC Warden Zenk and the MDC Captain told the OIG that correctional staff destroyed hundreds of tapes to free up storage space at the MDC.

Consequently, videotapes that could have helped prove or disprove allegations of abuse raised by detainees were not available. The lack of videotape evidence hampered the OIG's investigation of detainee abuse complaints.

[PAGES 151 THROUGH 157 OMITTED]

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VIII. OIG Analysis

In the aftermath of the September 11 attacks, 184 aliens arrested on immigration charges were confined in high-security federal prisons, as opposed to less restrictive INS detention facilities. Eighty-four of these aliens were held at the MDC in Brooklyn, New York. These MDC detainees were held under "the most restrictive conditions possible," which included "lockdown" for at least 23 hours per day, extremely limited access to telephones, and restrictive escort procedures any time the detainees were moved outside their cells. To this end, the MDC created an ADMAX SHU specifically to confine the September 11 detainees.

The BOP played no role in deciding the security risk posed by individual September 11 detainees or their potential connections to terrorism. As discussed in Chapter 4, these decisions were made by the FBI in consultation with the U.S. Attorney's Office in the Southern District of New York and were communicated to the INS, whose agents generally arrested the aliens as part of a Joint Terrorism Task Force effort.

However, once the FBI characterized a detainee as "high interest" and the INS transferred the detainee to BOP rather than INS custody, the BOP took responsibility for the detainee's confinement. In the heightened state of alert after the terrorist attacks, the BOP combined a series of existing policies and procedures that applied to inmates in other contexts and applied them to the detainees they received after September 11, such as designating September 11 detainees as WITSEC inmates.

As a threshold matter, we question the criteria (or lack thereof) the FBI used to make its initial designation of the potential danger posed by September 11 detainees. The arresting FBI agent usually made this assessment without any guidance and based on the initial detainee information available at the time of arrest. In addition, there was little consistency or precision to the process that resulted in detainees being labeled "high interest," "of interest," or "of undetermined interest." While many of these decisions needed to be made quickly and were based on less than complete information, we believe the FBI should have exercised more care in the classification process, given the significant ramifications on detainees' freedom of movement and association depending on whether they were confined in a high-security facility such as the MDC or a less restrictive facility such as Passaic (discussed in Chapter 8). More important, as discussed in Chapter 4, the FBI devoted insufficient resources to investigating or clearing most of these detainees, resulting in their prolonged confinement under extremely high security conditions. Even after clearance, the BOP's delay in notifying the MDC lengthened even further these detainees' stay in the ADMAX SHU.

With regard to the conditions of confinement for detainees at the MDC, we appreciate that the influx of high-security detainees stretched MDC resources to their limit, with MDC staff members often working double shifts to monitor the detainees during a highly emotional period of time. We also appreciate the uncertainty surrounding these detainees and the chaotic conditions in the immediate aftermath of the September 11 attacks. However, our review raises serious questions about the treatment of the September 11 detainees housed at the MDC in several regards.

First, BOP officials imposed a "communications blackout" specifically for September 11 detainees within a week of the terrorist attacks. During this blackout period, detainees were not permitted to receive any telephone calls, visitors, or mail, or to place any telephone calls or send mail. While we were unable to determine the exact length of this communications blackout, it appears to have lasted several weeks, after which time the September 11 detainees were permitted limited attorney and social contacts. During this time, attorneys and family members were unable to receive any information about these detainees, including where they were being held. While such a policy was within the BOP's discretion, we question the justification for a total communications blackout on all these individuals, particularly for the length of time that it was imposed. In addition, the telephone limitations imposed on this group of detainees—one legal telephone call per week and one social call per month—further hindered the detainees' ability to obtain legal assistance, which posed a significant problem since the majority of the detainees entered the MDC without counsel.

Second, as noted above, the BOP initially designated all September 11 detainees as WITSEC inmates. Usually, this designation is applied to individuals who agree to cooperate with law enforcement by providing testimony against criminal suspects. Application of this WITSEC classification to the September 11 detainees, however, resulted in MDC officials continuing to withhold information about the detainees' location, even after the communications blackout was lifted.

This classification frustrated efforts by the detainees' attorneys, family members, and even law enforcement officers to determine where the detainees were being

held. Because information on WITSEC inmates is tightly restricted, even MDC staff working at the front desk in the facility's lobby did not have access to information about the September 11 detainees. We found that MDC staff frequently—and mistakenly—told people who inquired about a specific detainee that the detainee was not held at the facility when, in fact, the opposite was true. Instead, the staff referred the caller or visitor to the BOP's Inmate Locator system for information about where an individual detainee was being held. But WITSEC inmates are not listed in this public system because of security reasons, and this prevented attorneys or family members from locating these September 11 detainees. We fault the MDC for not considering in a more timely manner the implications of labeling these September 11 detainees as WITSEC detainees and for not properly communicating to its employees—especially its staff who worked the facility's front desk—about the classification issues affecting September 11 detainees and how to properly address inquiries from the public.

The BOP tried at least twice to address this situation by reclassifying the September 11 detainees, first by renaming them "Group 155" inmates. Even then we found the BOP continued to use "WITSEC" as its primary designation. On October 31, 2001, the BOP reclassified the detainees as "Special SIS Cases." Neither reclassification alleviated the access issues confronted by detainees' attorneys and family members. In fact, we found that as late as March 1, 2002—more than six months after the first September 11 detainees arrived at the MDC—the BOP's initial decision to classify the detainees as WITSEC inmates continued to cause confusion and resulted in attorneys being told incorrectly that their clients were not being held at the MDC.

We understand the MDC's efforts to follow instructions from BOP Headquarters and confine the September 11 detainees under secure conditions. That said, the detainees were pretrial inmates, most of whom had not obtained legal representation by the time they were confined at the MDC. Consequently, their designation by BOP officials as WITSEC inmates hindered the detainees' efforts to contact legal counsel and their families. We also believe the BOP should have taken timelier and more effective steps to address the situation after it realized the impact this designation was having on the September 11 detainees and the ability of their attorneys and families to locate them.

Third, with regard to the policies within the MDC for confining the September 11 detainees, MDC officials used existing BOP policies applicable to inmates in disciplinary segregation, and confined the September 11 detainees in the ADMAX SHU. The detainees were placed in restraints whenever they were outside their cells, including handcuffs, leg irons, and heavy chains. Four staff members were required to be present each time a detainee was placed into restraints and escorted from a cell. The detainees also were required to remain in restraints during their non-contact visits with their attorneys or family members.

Because of these restrictive conditions, we believe it was important for the FBI, INS, and BOP to determine, in a reasonable time frame, whether these detainees were connected to terrorism or whether they could be cleared to be moved from the ADMAX SHU to the MDC's much less restrictive general population. Yet, detainees remained in the ADMAX SHU for a long period of time waiting for the FBI's clearance process which, as we described in Chapter 4, was excessively slow. Even when

the FBI cleared the detainees, they remained in the ADMAX SHU for days and sometimes weeks longer than necessary due to delays between the time the FBI cleared a detainee of a connection to terrorism and the time the MDC received formal notification of the clearance. In addition, we found that the MDC did not consistently follow its established procedures. Without explanation, it released at least four September 11 detainees from the ADMAX SHU prior to receiving clearance from the FBI that the detainee had no links to terrorism.

Fourth, the restrictive conditions imposed by the MDC prevented the detainees from obtaining counsel in a timely fashion. The BOP has no national policy regulating the number or length of telephone calls that inmates in an ADMAX SHU can make to their attorneys. Consequently, the policy regulating the frequency and duration of legal telephone calls established by the MDC for September 11 detainees—while complying with very broad BOP national standards—severely limited the detainees' ability to obtain and consult with legal counsel.

As mentioned previously, most September 11 detainees did not have legal representation prior to their detention at the MDC (only 2 of the 19 detainees we interviewed had hired legal counsel before they entered the MDC). The MDC imposed a policy that permitted September 11 detainees housed in the ADMAX SHU only one legal call per week. This type of policy is more appropriate for pre-trial inmates who have obtained counsel prior to their incarceration rather than for inmates like the September 11 detainees who needed to find counsel.

Further complicating the detainees' efforts to obtain counsel, the pro bono attorney lists provided September 11 detainees by the INS through EOIR contained inaccurate and outdated information. As a result, detainees

often used their sole legal call during a week to try to contact one of the legal representatives on the pro bono list, only to find that the attorneys either had changed their telephone number or did not handle the particular type of immigration situation faced by the detainees. In addition, detainees complained that legal calls that resulted in a busy signal or calls answered by voicemail counted as their one legal call for that week. When questioned about this, MDC officials gave differing responses about whether or not reaching an answering machine counted as a completed legal call. We believe that counting calls that only reached a voicemail, resulted in a busy signal, or went to the wrong number was unduly restrictive and inappropriate.

In addition, the manner in which the MDC inquired whether the detainees wanted to place a legal call was unclear and inappropriate. In many instances, the unit counselor inquired whether September 11 detainees in the ADMAX SHU wanted their weekly legal call by asking, "are you okay?" For some period, several detainees told the OIG that they did not realize that an affirmative response to this rather casual question meant they opted to forgo their legal call for that week. We believe the BOP should have asked the detainees directly "do you want a legal telephone call this week?" rather than relying on the detainees to decipher that a shorthand statement "are you okay?" meant "do you want to place a legal telephone call?"

Our review determined that the MDC officials recognized their obligation to permit representatives from foreign consulates to visit with detainees and established a clearance procedure to facilitate these visits. However, we found that consular representatives experienced the same difficulties as attorneys in obtaining access to de-

tainees due to the BOP's categorization of the detainees as WITSEC inmates. In addition, the MDC's classification of detainee calls to their consulates as "social calls" severely limited the detainees' ability to contact their consulates in a timely manner, given the MDC's limit of one social call per month for detainees.

Fifth, the restrictive BOP policies and the classification of September 11 detainees also hindered family visits. Although MDC management tried to train reception area staff on proper procedures for granting visitation to detainee family members, problems persisted even many months after September 11.

Sixth, with regard to allegations of physical and verbal abuse, we concluded that the evidence indicates a pattern of abuse by some correctional officers against some September 11 detainees, particularly during the first months after the attacks. Most detainees we interviewed at the MDC alleged that MDC staff physically abused them. Many also told us that that MDC staff verbally abused them with such taunts as "Bin Laden Junior" or with threats such as "you will be here for the next 20-25 years like the Cuban people." Although most correctional officers denied such physical or verbal abuse, the OIG's ongoing investigation of complaints of physical abuse developed significant evidence that it had occurred, particularly during intake and movement of prisoners.[130]

Seventh, MDC staff failed to inform detainees in a timely manner about the process for filing complaints

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[130] To date, our investigation has not uncovered any evidence that the physical or verbal abuse was engaged in or condoned by anyone other than the correctional officers who committed it. However, our investigation is still ongoing.

about their treatment. Only 1 of the 19 detainees we interviewed said he received a facility handbook when he arrived that described the formal complaint process. Ten detainees told the OIG they did not learn about the complaint resolution process until they received their facility handbook 4 to 6 months after arriving at the MDC.

The Associate Warden for Programs told the OIG that all September 11 detainees received a facility handbook when they were processed into the MDC. Yet, even if the detainees received handbooks, staff apparently confiscated them as unacceptable items to retain in their ADMAX SHU cells. In addition, we found that a 2-page summary of MDC policies distributed to many of the detainees did not contain information about how to file a formal complaint. The haphazard fashion in which MDC staff handled dissemination of the facility handbook impeded the detainees' ability to seek review for their complaints about conditions of confinement at the MDC. If the detainees were not permitted to keep the facility handbook in their cells for security reasons, the MDC's 2-page summary of facility policies should have included information that described the process for filing a formal complaint.

Eighth, MDC staff appropriately took affirmative steps to prevent potential staff abuse against September 11 detainees—and protect MDC staff from unfounded allegations of abuse—by installing security cameras in each detainee's cell and by requiring staff to videotape all detainee movements outside their ADMAX SHU cells. However, the BOP's decision to permit MDC staff to destroy or reuse these videotapes after 30 days hampered the usefulness of the videotape system to prove or disprove allegations of abuse raised by individual detainees. We understand the difficulty in storing the hundreds of

videotapes the MDC accumulated after several months of taping the detainees. But the decision to recycle or destroy the videotapes created problems regarding allegations of physical abuse at the MDC. Detainees were unable to use videotape evidence to support allegations of abuse filed more than 30 days after an alleged incident. Similarly, MDC staff had more difficulty refuting abuse allegations raised by detainees if the complaint was filed more than 30 days after the incident.

Given the proactive steps taken to prevent or document incidents of physical abuse against September 11 detainees, we believe rescinding the videotape retention policy was unwise. If BOP and MDC management wanted to refute detainee allegations of abuse using videotape evidence, it was shortsighted on their part to assume that all such allegations would be made and resolved within 30 days.

Ninth, we found that recreation offered to the September 11 detainees was limited due to BOP security policies, the limited number of recreation cells within the ADMAX SHU, and lack of proper clothing that led detainees to regularly refuse recreation because it was offered most often in the early morning hours when it was colder in the open-air recreation cells.

Tenth, MDC staff subjected the September 11 detainees to having both lights illuminated in their cells 24 hours a day for several months longer than necessary, even after electricians rewired the ADMAX SHU range. Our review determined that, despite the initial representations to us by MDC officials, the MDC was able to reduce the amount of light in an individual detainee's cell as early as November 2001, but instead kept both cell lights illuminated until at least mid-March 2002. Eighteen of the 19 detainees we interviewed complained to the OIG

about the difficulty of sleeping with both lights illuminated 24 hours a day, citing exhaustion, depression, stress, and sleep deprivation. The MDC had little reason for keeping the lights constantly illuminated for as long as it did.

In sum, we recognize the uncertainties and confusion surrounding the initial policies and treatment relating to these September 11 detainees. Much about these detainees was unknown, and the BOP had to accept the FBI's loosely applied assessment of these detainees as "of interest" to the terrorism investigation. However, while we fault the FBI for the slowness of the clearance process, we believe the blackout and the initial WITSEC designation that the BOP imposed for several weeks was excessive, particularly because many of these detainees had no counsel or any contact with families. We also believe that the BOP instituted excessively restrictive policies on the detainees, particularly regarding telephone privileges. In addition, the BOP did not provide adequate information about the location of the detainees to the detainees' attorneys or their family members. These policies hindered the detainees' ability to obtain and consult with legal counsel and were more appropriate for detainees who had attorneys prior to arriving at the MDC. We also believe that some of the detainees were subject to physical or verbal abuse. Finally, we believe that some of the conditions of confinement were unnecessarily severe, such as two lights constantly illuminated in the detainees' cells. While the chaotic situation and the uncertainties surrounding the detainees' role in the September 11 attacks and the potential for additional terrorism explain some of these problems, they do not explain or justify all of them. We believe that the Department and the BOP

should consider these issues carefully in an effort to avoid similar problems in the future.

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CHAPTER NINE
OIG RECOMMENDATIONS

[PAGES 187 THROUGH 190 OMITTED]

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VI. BOP Housing Of Detainees

At least 84 September 11 detainees arrested on immigration charges in connection with the September 11 investigation were confined at the MDC. The BOP housed these detainees in its ADMAX SHU under extremely restrictive conditions. While the BOP played no role in deciding which detainees were "of interest" or "of high interest" to the FBI, once detainees were transferred to one of its facilities the BOP assumed responsibility for the detainees' conditions of confinement.

The BOP combined a series of existing policies and procedures that applied to inmates in other contexts to create highly restrictive conditions of confinement for September 11 detainees held at the MDC and other BOP facilities. For example, the BOP initially designated September 11 detainees as witness security (WITSEC) inmates, a categorization that restricted public knowledge of and access to the detainees. This designation frustrated efforts by detainees' attorneys, family members, consular officials, and even law enforcement officers to determine the detainees' location, given how tightly information about WITSEC inmates is held. In addition, the BOP's initial communications blackout and its policy of permitting detainees one legal call per week (coupled with arbitrary policies on whether reaching an answering

machine counted as the legal call), severely limited the detainees' ability to contact and consult with legal counsel.

10. We recommend that the BOP establish a unique Special Management Category other than WITSEC for aliens arrested on immigration charges who are suspected of having ties to terrorism. Such a classification should identify procedures that permit detainees' reasonable access to telephones more in keeping with the detainees' status as immigration detainees who may not have retained legal representation by the time they are confined rather than as pre-trial inmates who most likely have counsel. In addition, BOP officials should train their staff on any new Special Management Category to avoid repeating situations such as when MDC staff mistakenly informed people inquiring about a specific September 11 detainee that the detainee was not held at the facility.

11. Given the highly restrictive conditions under which the MDC housed September 11 detainees, and the slow pace of the FBI's clearance process, we believe the BOP should consider requiring written assessments from immigration authorities and the FBI prior to placing aliens arrested solely on immigration charges into highly restrictive conditions, such as disciplinary segregation in its ADMAX SHU. Absent such a particularized assessment from the FBI and immigration authorities, the BOP should consider applying its traditional inmate classification procedures to determine the level of secure confinement required by each detainee.

12. We found delays of days and sometimes weeks between when the FBI notified the BOP that a Sep-

tember 11 detainee had been cleared of ties to terrorism and when the BOP notified the MDC that the detainee could be transferred from its ADMAX SHU to the facility's general population, where conditions were decidedly less severe. We recommend that BOP Headquarters develop procedures to improve the timeliness by which it informs local BOP facilities when the detention conditions of immigration detainees can be normalized.

13. We found evidence indicating a pattern of physical and verbal abuse by some MDC corrections staff against some September 11 detainees. While the OIG is continuing its administrative investigation into these matters, we believe MDC and BOP management should take aggressive and proactive steps to educate its staff on proper methods of handling detainees (and inmates) confined in highly restrictive conditions of confinement, such as the ADMAX SHU. The BOP must be vigilant to ensure that individuals in its custody are not subjected to harassment or more force than necessary to accomplish appropriate correctional objectives.

14. BOP and MDC officials anticipated that some September 11 detainees might allege they were subject to abuse during their confinement. Consequently, they took steps to help prevent or refute such allegations by installing cameras in each ADMAX SHU cell and requiring staff to videotape all detainees' movements outside their cells. Unfortunately, the MDC destroyed the tapes after 30 days. We recommend that the BOP issue new procedures requiring that videotapes of detainees with alleged ties to terrorism housed in ADMAX SHU units be retained for at least 60 days.

15. We recommend that the BOP ensure that all immigration detainees housed in a BOP facility receive full and timely written notice of the facility's policies, including procedures for filing complaints. We found that the MDC failed to consistently provide September 11 detainees with details about its Administrative Remedy Program, the formal process for filing complaints of abuse.

16. Some MDC correctional staff asked detainees "are you okay" as a way to inquire whether they wanted their once-a-week legal telephone call. Detainees told the OIG that they misunderstood this question and, consequently, unknowingly waived their opportunity to place a legal call. We recommend that the BOP develop a national policy requiring detainees housed in SHUs to affirm their request for or refusal of a legal telephone call, and that such affirmance or refusal be recorded in the facility's Legal Call Log.

17. We recommend that the MDC examine its ADMAX SHU policies and practices in light of the September 11 detainees' experiences to ensure their appropriateness and necessity. For example, we found that while the MDC offered September 11 detainees exercise time in the facility's open-air recreation cell, they failed to provide suitable clothing during the winter months that would enable the detainees to take advantage of this opportunity. In addition, we found that the MDC kept both lights on in the detainees' cells 24 hours a day for several months after they had the ability to turn off at least one of the cell lights.

[PAGES 194 THROUGH APPENDIX K OMMITTED]

* * *

APPENDIX G

02/27/2006 11:10 FAX 215 521 7479
10/27/2003 12:40 FAX 215 597 4691

ATTN: Matthew Strugar
212-614-6499

SEPTEMBER 14, 2001

U.S. Department of Justice
Federal Bureau of Prisons
Metropolitan Detention Center
Brooklyn, New York 11232

MEMORANDUM TO: All Staff Assigned to SHU

FROM: S. Lopresti, Captain

SUBJECT: Suspected Terrorist Inmates being Housed in the Special Housing Unit

The following have been adopted to provide staff with consistent guidelines and procedures when interacting with suspected terrorist inmates in the Special Housing Unit. The staff members assigned to work this unit will be selected by the Warden. The staff members must perform their assigned duties in a professional manner at all times. They must not attempt to humiliate or provoke the suspected terrorists in any way, shape or form. Professionalism must be demonstrated at all times by the

staff members while assigned to the unit. The Executive Staff at the MDC Brooklyn have determined the suspected terrorists, have been classified as "High Security" inmates, based on their precipitating offense, past terrorist behavior and the inability to adapt to incarceration. The following procedures apply for these individuals:

OPERATIONS:

SHU Lieutenant:

The SHU Lieutenant is directly responsible for the supervision of the staff members assigned to the unit. The SHU Lieutenant must demand professional behavior from the staff assigned to this unit. The SHU Lieutenant must directly supervise the routine operations of the unit to include the following.

- Ensure the unit is totally **locked down and secured** prior to moving these inmates within the unit.
- Ensure all inmates are **secured behind a locked door** prior to moving these inmates within the unit.
- Must be present **any time** the food slot or cell door is opened.
- Ensure the inmates are escorted by three officers plus the **SHU Lieutenant** at all times.
- Must directly supervise all staff contact with the inmates.
- Must supervise all inmate activities, recreation, and supplies on the day watch shift.
- Ensure the inmates are properly placed in restraints.
- Ensure the issue and retrieval of the disposable razor.

- Review all Inmate Requests to Staff Member from the suspected terrorists and consult with the Captain for final disposition.
- Ensure the proper handling and processing of all inmate mail.

Inmate Movement:

Due to the serious security concerns, every escort conducted on the South Tier of the Special Housing Unit must be videotaped. The suspected terrorists must be moved one at a time. The South Tier of the Special Housing Unit must be totally locked down, with every inmate secured behind a locked door, prior to moving an inmate. These individuals must be placed in restraints prior to exiting from their assigned cell. As soon as the suspected terrorist exits from the cell, he must be placed in leg irons, searched and screened with a hand metal detector. He must be escorted by three officers and the Lieutenant at all times. The staff must maintain control of the inmate by holding the restraints while escorting the inmate.

The Captain must approve for the suspected terrorist to be escorted from the unit for any reason. **Approval must be received from the Warden prior to these individuals being escorted from the institution.**

A Four-Man Hold:

A four-man hold is defined as three staff members and a Lieutenant being present while the inmate is placed into restraints and escorted from within his assigned cell. The restraining process will not begin until the Lieutenant and three staff members are present and prepared to accomplish the task.

Restraints:

Anytime the inmate is moved from within his assigned cell, staff must place the inmate into the appropriate restraints. The restraints deemed appropriate for the suspected terrorist is as follows:

Routine Escort:

- Handcuffs (Applied to the rear)
- Leg irons

When the Inmate is Required to Sign Forms/Interviews/Visiting:

- Handcuffs
- Martin Chain
- Leg Irons

Anytime the Inmate is Escorted Out From the Institution:

- Handcuffs
- C&S Handcuff Cover (Black Box)
- Martin Chain
- Leg Irons
- Padlock

Recreation:

The inmate must have the opportunity to participate in the recreation program for five hours per week. The five hours will be broken down into five, (5), one (1) hour increments throughout the week. The SHU Lieutenant will ensure the inmates are provided with the opportunity to recreate **weekdays, Monday through Fridays, 7:30 am-4:00 pm. The inmates will "Rec Alone" in the recreation cells.**

Meals:

All meals will be supervised by the SHU Lieutenant. The meals must be served in a Styrofoam food tray. All utensils will be soft plastic. The staff must inspect the food and account for all items prior to serving the mean [*sic*] to the inmates. Any plastic wrap covering the meal must be removed by the staff members prior to serving the meal to the inmate. The plastic wrap must be disposed of as trash. Any food service item which goes into the cell for the meal, **MUST** come out of the cell after the meal. Ensure the food trays, and utensils are in the same condition as when they were delivered. Inmates may not retain food trays, or utensils in their assigned cells after the feeding is completed. Any discrepancy will be reported to the Captain immediately.

Disposable Razors:

The inmates may request a razor 8:00 am – 9:30 am on **Monday, Wednesday and Friday**. The SHU Lieutenant will supervise the issue and retrieval of the disposable razor. The razors will be collected, and accounted for by the SHU Lieutenant by **10:00 am**. The accountability, issuance, and retrieval of the disposable razors will be recorded in the "Razor Log Book". Any discrepancy will be reported to the Captain immediately.

Showers:

Inmates must be afforded the opportunity to take a shower three times per week. Even though the showers are within the inmate's cells, there must be days designated for inmate showers in accordance with national policy. The shower days at the MDC Brooklyn are **Monday, Wednesday and Friday**. The OIC will ensure the appropriate entries are completed on the inmate's BP-292 for those days.

Cell Rotations:

The cell rotation for inmates in this status will occur anywhere from 3-7 days, not to exceed **7 days**. The cell rotation will be conducted on the day watch shift, supervised by the SHU Lieutenant. The OIC will document the rotation in the "Cell Rotation" log book.

Cell Search:

A cell search **must be** conducted every day of the week. The SHU Lieutenant will supervise the cell search. The results of the cell search will be recorded in the Unit Search Log. The SHU Lieutenant will initiate **disciplinary action for any infractions.**

Cell Sanitation:

Cell sanitation will be conducted on **Tuesday and Thursday**, on the day watch shift. The cleaning supplies will be issued to the inmates through the food slot. The inmate(s) are expected to keep their cells in a high state of sanitation, (make up their beds, discard trash, etc.), every day of the week. **Under no circumstances will cleaning equipment be allowed to remain in a cell after cleaning.**

Clothing and Towel Exchange:

The authorized amount of clothing for inmates in this status shall consist of the following:

(1) jumpsuit

(1) T-shirt

(1) undergarment

(1) pair of socks

Clothing and towel exchange **will be** conducted on the say [*sic*] watch shift **Monday, Wednesday and Friday**. The

exchange will be one-for-one. The clothing exchange will be documented in the Special Housing Unit log book by the SHU OIC.

Linen Exchange:

Inmates assigned to the Special Housing Unit receive the following linen issue:

(2) Blankets

(1) Sheet

(1) pillow case

The SHU Lieutenant will supervise the exchange of these items on the day watch shift. The items will be exchanged on a one for one basis, **only on Friday**. The SHU OIC will ensure to document the linen exchange in the Special Housing Unit log book. All items will be searched before providing them to the inmate.

Hygiene Supplies:

The SHU Lieutenant will supervise issuance of hygiene supplies every day. The SHU Officers will ensure the inmate receives, toilet paper, toothbrush, tooth paste, etc. **The security toothbrush is the only authorized toothbrush for use on this unit.** The hygiene supply will be provided to the inmate and then retrieved by the officers a short time later.

Writing Supplies:

There will be no personal supplies retained by the inmate. Once approval for the inmate to retain supplies is granted by the Warren [*sic*], the SHU Lieutenant will supervise the issuance of writing paper, Inmate Requests to Staff Member, envelopes, etc., on **Tuesday and Thursday**. The pencils issued to these individuals must be less than 3" in length, have no eraser or metal end.

Personal Property:

The inmates are not permitted to retain anything in their assigned cells except linen. Every item which enters the cell, which the inmate does not consume, must be returned. These inmates would not be permitted to retain personal property. As the situation evolves, the determinations concerning the type and quantity of personal property items to be retained by the inmates would be determined by the Warden. All personal property must be inspected and searched by the SHU Lieutenant prior to allowing the inmate to retain the item(s). The Captain will be consulted concerning all personal property concerns.

Commissary: There will be no commissary privileges for these individuals until further notice. Once the approval is granted from the Warden, the inmates' commissary slips will be forwarded to the SHU Lieutenant for review prior to being sent to the Commissary. When the Commissary orders are delivered to the Special Housing Unit, the SHU Lieutenant will inspect the packages and search the items (without destroying them), to prevent contraband from entering the unit. The SHU Lieutenant will supervise the issuance of the commissary items to the inmate.

The inmates may purchase and retain items necessary for health and sanitation. Inmates are not permitted to possess the following items:

- Combs
- Condiments, hot sauces or spices of any kind
- Batteries
- Pens or pencils, (Except pencils less than 3" in length, or safety pens)

- Hot tea, coffee, boiling water or any liquid at a temperature which can be used to harm another person
- Any container in which to store liquids (*i.e.* cups, tumblers, jars, bowls)
- Any type of squeeze bottle or container
- Any other item determined by the Captain to be capable of being converted into dangerous instruments

Reading Materials: Any reading materials will be furnished by the Education Department. The Captain will review and approve all reading materials prior to issuance to the inmates. The SHU Lieutenant will supervise the issuance and collection of the reading materials. The limits are as follows:

(1) soft covered book

(1) magazine

PROGRAMS:

Telephone Calls:

Social: There will be no social telephone calls until further notice. Once approval is granted from the Warden, the inmates will submit an Inmate Request to Staff Member prior to the day he/she requests to use the phone. The SHU Lieutenant will review the request and consult with the Captain. If the request is approved, the SHU Lieutenant will contact the SIS Office to inform the Phone Monitor of the telephone call. The SIS Office will live monitor each telephone call placed by the suspected terrorists. An interpreter/translator must be utilized to translate the telephone call from the native language to English. The inmate telephone will not enter the inmate's cell. The receiver will go into the cell, but the

telephone will remain on the floor in front of the inmate's cell for staff to be able to observe at all times.

Legal: There will be no legal telephone calls until further notice. Once approval is granted from the Warden, the Inmates would be permitted access to their attorneys. The inmate will submit an Inmate Request to Staff Member to the SHU Counselor. The Counselor will review the request and consult with the Captain. If approved, the telephone call will be placed by the SHU Counselor. The SHU Counselor must confirm that the person contacted on the other end of the line is the inmate's attorney or precleared legal staff member. Once the SHU Counselor confirms the identity of the person on the telephone, he/she will turn the telephone receiver over to the inmate. There are additional restrictions which the SHU Lieutenant and the SHU Counselor must be familiar with, please refer to the Special Administrative Measure. All Legal calls will be recorded in this log book. Legal phone calls will be recorded by the SHU Counselor affording the inmate the call.

Mail:

General Correspondence: All outgoing general Correspondence must be received unsealed. The mail will be delivered to the SHU Lieutenant for further processing. The SHU Lieutenant will deliver the mail to the AW(C).

All incoming general correspondence will be delivered to the AW(C) for proper processing. After the mail is properly processed, it will be delivered to the SHU Lieutenant. The SHU Lieutenant will ensure all procedural requirements have been met. The SHU Lieutenant will deliver the mail to the inmates.

Legal Mail: All outgoing legal mail must be properly marked and identified as set forth in national policy. The

legal mail must be addressed to the inmates' attorney of record and/or their precleared staff. The mail will be delivered to the **SHU Lieutenant** for further processing. The SHU Lieutenant will deliver the mail to the AW(C) for proper processing. There will be no exceptions to this rule.

Incoming legal mail will be processed in accordance with national policy and institutional procedures. After the mail is processed, the mail will be delivered to the AW(C).

Visiting:

Social: There will be no social visiting until further notice. Once approval for the visiting is granted by the Warden, the visiting will take place in the non-contact area of the Special Housing Unit. The inmates will be fully restrained, with handcuffs, martin chain and leg irons during the visit. The inmates will only be permitted to visit with their immediate family members. All social visiting communications will occur in English, unless a FBI/BOP approved translator is readily available to monitor the visit. This visit will be directly supervised by the **SHU Lieutenant.**

Legal: There will be no legal visiting until further notice. Once approval for the visiting is granted by the Warden, the legal visits will occur in the non-contact visiting area. The inmates will be fully restrained in accordance with the previously outlined procedure. The inmates will only be permitted to visit with their attorneys of record and their precleared staff. This visit will be directly supervised by the **SHU Lieutenant.**

Law Library:

The inmates are not permitted to utilize the law library in the Special Housing Unit. The inmates must

submit an Inmate Request to Staff Member, requested specific law library materials from the Education Department. The Special Housing Unit Counselor will deliver this request to the Education Department. The Education Department must address the inmate's request within three working days. All materials will be inspected and searched by the SHU Lieutenant prior to issuing the materials to the inmates.

Medical:

The SHU Lieutenant will be present when the Physician's Assistant conducts the daily rounds in the SHU to attend to the inmates' medical needs. Any medications dispensed to the inmates' will be supervised by the SHU Lieutenant. Medical requests will be telephoned to the medical staff by the SHU OIC on an as needed basis. Medical appointments outside the unit will be coordinated by the medical staff through the Captain. The SHU OIC will ensure the Duty PA signs the BP-292's in the appropriate section each day.

Any questions, comments, or concerns regarding the above delineated procedures must be addressed to Captain LoPresti at extension 5163.

D.O.J. Sensitive ***F.O.I. Exempt***

RECORD AND BRIEFS

AUG 23 2016
OFFICE OF THE CLERK

No. 15-1363

IN THE

Supreme Court of the United States

DENNIS HASTY AND JAMES SHERMAN,
Petitioners,

v.

IBRAHIM TURKMEN, AKHIL SACHDEVA, AHMER IQBAL ABBASI, ANSER MEHMOOD, BENAMAR BENATTA, AHMED KHALIFA, SAEED HAMMOUDA, AND PURNA BAJRACHARYA,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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IN THE

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NO. 15-1363

DENNIS HASTY AND JAMES SHERMAN,

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IBRAHIM TURKMEN, AKHIL SACHDEVA, AHMER IQBAL ABBASI, ANSER MEHMOOD, BENAMAR BENATTA, AHMED KHALIFA, SAEED HAMMOUDA, AND PURNA BAJRACHARYA,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

REPLY FOR PETITIONERS HASTY AND SHERMAN

Respondents agree that this case involves "weighty issues implicating both this nation's security and its most core values." Br. in Opp. 36. So did the six Second Circuit judges who dissented from denial of rehearing en banc. As they observed, the case presents "questions of exceptional importance meriting further review." Pet. App. 232a. The importance of the issues is common ground.

With respect to petitioners Hasty and Sherman, the respondents' brief is otherwise largely an exercise in evasion. Respondents ignore the extraordinary nature of their *Bivens* claims against Hasty and Sherman. Respondents assert that Hasty and Sherman—local jailers—were constitutionally compelled to *disregard the FBI's terrorism designations*, and to unilaterally remove respondents from the restrictive confinement conditions those designations mandated. That was required, respondents allege, because Hasty and Sherman supposedly believed the FBI's designations were wrong. See, *e.g.*, Pet. 2, 11, 15-16, 19. No court has extended *Bivens* to a remotely analogous context. While respondents urge their claims are in "*Bivens*[']heartland," Br. in Opp. 24, because they assert "familiar constitutional claim[s] based on a familiar mechanism of injury," *id.* at 16, that underscores the defect in the Second Circuit's two-step "rights-injured"/"mechanism-of-injury" approach: It equates a case demanding that jailers contravene the FBI's terrorism designations with any ordinary conditions-of-confinement case. A decision holding that ground-level officials charged with implementing FBI terrorism designations can be held personally liable simply for *performing their job within the chain of command* is anything but "familiar." If there is to be a cause of action in these unique circumstances, Congress, not the courts, must create it.

Respondents commit the same mistake when they argue that the many special factors identified in the petition (at 24-26) should not preclude *Bivens* here. See Br. in Opp. 18-24. They gloss over that, under current Second Circuit law, that inquiry never gets made. Rather, under the Second Circuit's expansive "rights-injured"/"mechanism-of-injury" framework, no special-factors in-

quiry was conducted because this case is no different than any other conditions-of-confinement case to which *Bivens* has already been extended.

Respondents also ignore the Second Circuit's revision of this Court's precedents. Respondents urge that they have plausibly alleged that Hasty and Sherman had discriminatory intent under *Ashcroft* v. *Iqbal*, 556 U.S. 662 (2009), because their Complaint alleges that petitioners knew the government had no evidence linking respondents to terrorism. See Br. in Opp. 25-29. But respondents ignore the far more plausible explanation: That Hasty and Sherman did not disregard the FBI's terrorism determinations because they lacked authority and expertise to do so. And, like the Second Circuit panel, respondents would rewrite the law of qualified immunity. While respondents can cite *general* legal standards governing ordinary situations, they can cite no clearly established law that required Hasty and Sherman to act on their subjective assessment of respondents instead of respecting the FBI's determinations. Yet under the decision below, petitioners are potentially subject to ruinous personal liability. And respondents offer only a half-hearted effort to deny the circuit splits on these issues—splits recognized by judges in multiple circuits, including six Second Circuit judges below. Contrast Pet. 20-24, with Br. in Opp. 24. Review is warranted.

I. The Case Presents Important Questions—And Circuit Conflicts—Regarding *Bivens*' Scope

A. The Second Circuit's Framework Nullifies Special-Factors Analysis

This Court's cases are clear: Courts must "'pay[ ] particular heed'" not to expand *Bivens* to a new context where "'special factors counsel[ ] hesitation.'" *Wilkie* v.

Robbins, 551 U.S. 537, 550 (2007). "Special factors" include, among other things, matters of national security, foreign affairs, intelligence, and immigration. See Pet. 16-24. For the past 35 years, this Court has repeatedly invoked special factors in refusing to "extend *Bivens* liability to any new context or new category of defendants." *Corr. Servs. Corp.* v. *Malesko*, 534 U.S. 61, 68 (2001).

Respondents do not deny that the Second Circuit bypassed the "special factors" analysis because, according to the panel, it was not extending *Bivens* at all. Under the Second Circuit's test, a context is not "new" if the "rights injured" and the "mechanism of injury" match those in prior *Bivens* actions. Pet. App. 24a-26a. Respondents theorize that that two-part test "leav[es] ample basis for courts to pause before endorsing exotic new theories." Br. in Opp. 15-16. "At a sufficiently high level of generality," however, even very different cases can be "analogized to some other claim for which a *Bivens* action is afforded." *Arar* v. *Ashcroft*, 585 F.3d 559, 572 (2d Cir. 2009) (en banc), cert. denied, 560 U.S. 978 (2010). And that is just what the Second Circuit's new test does here: It requires courts to look at *two* factors at a high level of generality—nature of right and mechanism of injury. That does not address special factors; it ignores them.

This case illustrates the defect in that approach. The Second Circuit declined to consider special factors because it deemed both the constitutional rights at issue ("substantive due process," "equal protection," and "Fourth Amendment" violations) and the mechanism (*e.g.*, "punitive conditions without sufficient cause") familiar. Pet. App. 24a, 28a; see Br. in Opp. 15. But that ignores every aspect of "context" that matters. The "new context" analysis requires more: "It demands considera-

tion of *all factors* counseling for and against an implied damages action in the *specific legal and factual circumstances presented.*" Pet. App. 91a. (Raggi, J., dissenting) (emphasis added). A test that does not even acknowledge the differences between a run-of-the-mill conditions-of-confinement case and respondents' allegations—that local jailers were required to disregard the FBI's terrorism designations and impose less restrictive conditions based on their own subjective assessment—is no test at all. No context would be new, and special-factors analysis would be a dead letter. By eliminating that safeguard, the Second Circuit "invite[s]" *Bivens*' expansion into "every sphere of legitimate governmental action." *Wilkie*, 551 U.S. at 561.

B. Respondents' Special-Factors Analysis Underscores the Need for Review

Respondents argue there are no "special factors" that preclude *Bivens* here. Br. in Opp. 18-24. But the panel below dispensed with that inquiry entirely. See Pet. App. 21a-29a. The propriety of doing so is precisely the issue before this Court.

Respondents' special-factors arguments, moreover, illustrate the necessity of addressing those factors expressly. Respondents acknowledge that factors "related to national security" may "counsel[ ] hesitation," as Congress, not the courts, should decide when to create new causes of action touching on such matters. Br. in Opp. 21. Invoking the Complaint's allegation that Hasty and Sherman "knew there was no reason to suspect [respondents] of any connection to terrorism," however, respondents deny that this case raises any national-security issues; it is improper, they assert, to contradict the Complaint. *Id.* at 20-21. Respondents miss the point. Special-factors analysis must consider the effect of the litigation that

would result, including when defendants seek to refute the Complaint's allegations on the merits. And on the merits, "the executive's exercise of national security authority" would be "*the* critical focus" of this case. Pet. App. 104a. Petitioners potentially would need to produce evidence showing why they *did* have reason to suspect respondents of connection to terrorism and why the FBI's designations were warranted. Whatever respondents' pleadings say, *litigating* those allegations would "require judicial intrusion into matters of national security and sensitive intelligence information." *Wilson* v. *Libby*, 535 F.3d 697, 710 (D.C. Cir. 2008) (emphasis added). That special factor counsels hesitation. See *Meshal* v. *Higgenbotham*, 804 F.3d 417, 425-426 (D.C. Cir. 2015); *Arar*, 585 F.3d at 576.

Respondents likewise dispute that this case implicates special factors relating to immigration. Br. in Opp. 18. Their nationality and status, they assert, is irrelevant because they do not "challenge any immigration proceeding or raise any question of immigration law." *Ibid.* But "the 9/11 hijackers were all foreign nationals," and the panel below conceded that the government's response "carrie[s] a major immigration law component." Pet. App. 8a. And "immigration issues 'have the natural tendency to affect diplomacy, foreign policy, and the security of the nation'" and "often involve 'the disclosure of foreign-policy objectives and * * * foreign-intelligence products.'" *Mirmehdi* v. *United States*, 689 F.3d 975, 982-983 (9th Cir. 2011). But the panel did not address that or any other special factor. The fact that the Second Circuit's test excuses courts from considering such factors underscores the necessity of this Court's review.

C. The Circuits Are in Conflict

Finally, the decision below has spawned multiple circuit splits on *Bivens* issues. See Pet. 20-24. Respondents state that there is "no circuit split," Br. in Opp. 2, 24, calling petitioners' arguments "unpersuasive," *id.* at 34. But it is not just petitioners—multiple judges have acknowledged the conflicts. In *De La Paz* v. *Coy*, 804 F.3d 1200 (5th Cir. 2015), Judge Prado concluded that the Fifth Circuit's decision "reache[d] the opposite conclusion" as *Turkmen* and "put[ ] [the Fifth Circuit] in conflict with" the Second. *Id.* at 1202 (Prado, J., dissenting). Similarly, in *Meshal*, Judge Pillard noted conflict between the D.C. Circuit's decision and the Second Circuit's decision here. See 804 F.3d at 443 (Pillard, J., dissenting) (noting that the "law enforcement investigations in *Turkmen* * * * were at least as related to the investigation of suspected terrorism as the investigation" in *Meshal*, "but the Second Circuit found no bar to *Bivens* claims"). And the six Second Circuit judges who dissented from denial of rehearing en banc observed that the panel decision placed the Second Circuit "at odds" with four "sister circuits" and made it the first circuit to imply "a *Bivens* damages action * * * for actions taken to safeguard our country in the immediate aftermath of the 9/11 attacks." Pet. App. 231a, 233a. Respondents do not even address their analysis.

II. The Second Circuit's Decision Defies Settled Qualified Immunity Principles

The Second Circuit's decision to deny Hasty and Sherman qualified immunity reflects the same errors embedded in its extension of *Bivens*—it assessed respondents' claims at a high level of generality without regard for the particular context. See Pet. 27-30. Respondents simply repeat the error.

To defeat qualified immunity, a plaintiff must show the defendant violated "clearly established" rights. *Wood* v. *Moss*, 134 S. Ct. 2056, 2061 (2014). An official violates "clearly established" rights when, "at the time of the challenged conduct, '[t]he contours of [the] right [were] sufficiently clear' that every 'reasonable official would have understood that what he is doing violates that right.'" *Ashcroft* v. *al-Kidd*, 131 S. Ct. 2074, 2083 (2011). The rights thus cannot be evaluated at "a high level of generality," *id.* at 2084, but must account for the "'*particular* conduct'" in the "'specific context'" at issue, *Mullenix* v. *Luna*, 136 S. Ct. 305, 308 (2015).

The Second Circuit here denied qualified immunity, finding it clearly established "that a particular condition or restriction of pretrial detention not reasonably related to a legitimate government objective is punishment in violation of the constitutional rights of detainees." Pet. App. 47a. But that just states the general legal standard—it does not address the perspective of a reasonable officer in the specific conditions he confronted. See Pet. 28-30. Rather than retreat from the Second Circuit's genericized mode of analysis, respondents double down on it. They claim that "[f]ew legal rules are as securely and precisely established as the prohibition on deprivations of rights motivated by race, religion, ethnicity or national origin." Br. in Opp. 31. And they claim the Constitution clearly proscribes special detention absent "any individualized basis to find [respondents] more dangerous than any ordinary civil detainee." *Id.* at 30.[1]

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[1] Respondents claim they "do not agree * * * 'that the restrictive conditions of confinement * * * could be lawfully imposed on anyone for whom the government had individualized suspicion of terrorism.'" Br. in Opp. 29 n.11 (quotation marks omitted). But they con-

Respondents, however, cannot merely recite the relevant principle in the abstract. They must show that every "'reasonable official'" facing the circumstances *Hasty and Sherman confronted here* would have understood his conduct to be unlawful. *Anderson* v. *Creighton*, 483 U.S. 635, 640 (1987). Respondents identify no precedent establishing that jailers are constitutionally obligated to disregard *FBI terrorism designations* with which they disagree. Respondents retort that the Court should not "define the legal rights at issue so narrowly as to be virtually coterminous with the precise facts of the case." Br. in Opp. 31. The test under this Court's cases, however, is whether any reasonable officer, confronted by the "'specific context'" at issue, would necessarily understand that his particular conduct is unlawful. *Mullenix*, 136 S. Ct. at 308. Neither the Second Circuit nor respondents attempted to make such a showing.

Respondents likewise make no effort to reconcile the Second Circuit's holding regarding § 1985(3) with this Court's precedents. See Pet. 30-31. The Second Circuit's rule—under which plaintiffs may proceed if the conduct clearly violates *some* provision of law, even if it is not the one the plaintiff invokes for his cause of action—defies *Elder* v. *Holloway*, 510 U.S. 510, 515 (1994), and *Davis* v. *Scherer*, 468 U.S. 183, 194 n.12 (1984).

III. THE DECISION BELOW EVISCERATES *IQBAL*'S PLAUSIBILITY REQUIREMENT

Finally, the decision below renders *Iqbal*'s plausibility requirement a virtual nullity. While respondents contend

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cede the issue is not relevant, *ibid.*, as their claim turns on the alleged absence of individualized suspicion—not a general rule about permissible conditions, see Pet. App. 49a-52a.

otherwise, the "detailed factual allegations" they invoke in response do not address Hasty and Sherman at all. See Br. in Opp. 25-29.

The Second Circuit did not dispute that respondents were lawfully detained. Pet. App. 237a. It did not deny that respondents were designated by the FBI as "'of interest'" to the 9/11 investigation and thus, under BOP policy, had to be held under the most restrictive conditions permissible. *Id.* at 17a-19a. But the panel deemed it plausible that Hasty and Sherman "knew" the "FBI lacked any individualized suspicion for many of the detainees," knew that the FBI's designations were wrong, and thus imposed the conditions punitively. Pet. App. 50a. That does not meet *Iqbal*'s requirement of "facial plausibility," as it does not "'ten[d] to exclude' an alternative 'explanation for defendants'' conduct." Br. in Opp. 27 (quoting *Bell Atl. Corp.* v. *Twombly*, 550 U.S. 544, 552 (2007)).

Petitioners identified the "'obvious'" and "more likely" explanation, *Iqbal*, 556 U.S. at 681-682, for respondents' restrictive confinement—that Hasty and Sherman deferred to the terrorism designations made by the FBI, an agency with far more national-security experience and likely more information than it shared with Hasty and Sherman. See Pet. 32. Respondents' contrary interpretation—that Hasty and Sherman believed the FBI was faxing all confidential information it had on terrorism suspects into the prison for petitioners to review—is facially implausible. Respondents offer no response.[2]

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[2] Nor do respondents say anything persuasive about the adequacy of their allegations regarding the unofficial conditions. Pet. 33-34. Respondents assert in their statement (but not their argument) that

IV. THE ISSUES ARE IMPORTANT AND RECURRING

Respondents do not dispute the importance of the questions presented in this case. To the contrary, they acknowledge this case raises "weighty issues implicating both this nation's security and its most core values." Br. in Opp. 36. Respondents nonetheless claim that the issues are too important for decision while the Court has only eight members. *Ibid.* The Court, however, should have no difficulty garnering a majority for the correct result with its current composition. The Court has ably functioned with fewer than nine Justices at times throughout its history. A six-Justice Court decided *Marbury* v. *Madison*, 5 U.S. 137 (1803). See Judiciary Act of 1789, ch. 20, § 1, 1 Stat. 73. There is no reason the Court cannot capably resolve cases like this with eight members today.

* * * * *

"Sherman was frequently present on the ADMAX unit, yet he * * * failed to correct the abuses he witnessed or learned of." Br. in Opp. 8-9. But respondents omit that the panel found those allegations too "general," "conclusory," and "tenuous" to satisfy *Iqbal*. Pet. App. 55a. Indeed, the Complaint failed to allege that Sherman *ever* observed any specific instance of abuse, much less that he condoned or failed to act on one. Respondents assert that Hasty "facilitated" abuse by referring to detainees as "terrorists," limiting grievance procedures, and purposely avoiding the ADMAX unit. Br. in Opp. 8. But there is no evidence that Hasty observed, directed, or ratified any misconduct. Instead, respondents generally assert that Hasty "ignored some evidence" of abuse, or was "made aware," Pet App. 252a-253a (¶ 24)—the same type of allegation the Second Circuit dismissed as to Sherman, *id.* at 55a. Compare *id.* at 252a-253a (¶ 24), with *id.* at 253a (¶ 26). These allegations are so devoid of factual content that they do not come close to meeting *Iqbal*'s requirements. See Pet. 33-34.

For the reasons above and in the petition, the petition for a writ of certiorari should be granted. The other petitions arising out of this case—filed by former Attorney General John Ashcroft and former FBI Director Robert Mueller in No. 15-1359, and by former INS Commissioner James Ziglar in No. 15-1358—likewise raise weighty issues. But the differences in perspective are significant. While Ashcroft, Mueller, and Ziglar *determined* policy, Hasty and Sherman were tasked with *implementing* it. Under the decision below, ground-level officials like Hasty and Sherman now must choose between following official policy and determinations, such as FBI terrorism designations and the conditions of confinement they mandate, or risk personal liability. The Court thus would benefit from reviewing the issues raised by petitioners Hasty and Sherman—the boots on the ground—as a critical complement to the views of officials at the policy-making level.[3]

CONCLUSION

The Court should grant this petition and, if it also grants the petitions of Ashcroft and Mueller (No. 15-1359) and Ziglar (No. 15-1358), consolidate the cases for argument.

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[3] Respondents complain that Ashcroft, Mueller, and Ziglar did not raise the *Bivens* issue before the Second Circuit. Br. in Opp. 13. Respondents overlook that petitioners Hasty and Sherman argued *Bivens* at all stages. Pet. App. 21a. Hasty and Sherman likewise pressed the § 1985(3) issues in the court of appeals. See Hasty C.A. Br. 49-50; Sherman C.A. Br. 57-61.

Respectfully submitted.

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IN THE

Supreme Court of the United States

DENNIS HASTY AND JAMES SHERMAN,
Petitioners,

v.

AHMER IQBAL ABBASI, *ET AL.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF FOR PETITIONERS DENNIS HASTY AND JAMES SHERMAN

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QUESTIONS PRESENTED

This putative class action was filed by foreign nationals who were illegally in the United States and detained following the September 11th terrorist attacks. The FBI designated respondents as "of interest" or "high interest" to its investigation into the attacks; Bureau of Prisons policy mandated that detainees so designated be housed in the most restrictive conditions permissible. Respondents brought this action seeking to hold petitioners Dennis Hasty and James Sherman, who were the Warden and Associate Warden at the Metropolitan Detention Center, personally liable in damages, along with others. Respondents claim that Hasty and Sherman should be liable because (*inter alia*) they concluded—and thus "knew"—that *the FBI* lacked evidence to support its terrorism designations for respondents. The questions presented are:

1. Whether, as the Second Circuit held, the judicially implied cause of action for damages against individual officials recognized in *Bivens* v. *Six Unknown Named Agents*, 403 U.S. 388 (1971), extends to this context.

2. Whether qualified immunity was properly denied, notwithstanding the specific circumstances confronted by petitioners—including the FBI's terrorism designations for respondents—because the Constitution "clearly" prohibits any "condition of pretrial detention not reasonably related to a legitimate governmental objective," Pet. App. 58a, or imposed "because of * * * race, ethnicity, religion, and/or national origin," *id.* at 74a.

3. Whether the allegations against Hasty and Sherman—such as the assertion that they "knew" the FBI's terrorism designations for respondents were wrong but imposed otherwise mandatory confinement conditions because they had discriminatory intent—are sufficiently plausible to state a claim under *Ashcroft* v. *Iqbal*, 556 U.S. 662 (2009).

PARTIES TO THE PROCEEDINGS BELOW

Ibrahim Turkmen, Akhil Sachdeva, Ahmer Iqbal Abbasi, Anser Mehmood, Benamar Benatta, Ahmed Khalifa, Saeed Hammouda, and Purna Raj Bajracharya were plaintiffs and/or plaintiffs-intervenors in the district court and appellees-cross-appellants in the court of appeals.

Dennis Hasty, Michael Zenk, and James Sherman were defendants in the district court and appellants in the court of appeals.

John Ashcroft, Robert Mueller, and James W. Ziglar were defendants in the district court and cross-appellees in the court of appeals.

Asif-Ur-Rehman Saffi, Syed Amjad Ali Jaffri, Shakir Baloch, Hany Ibrahim, Yasser Ebrahim, and Ashraf Ibrahim were plaintiffs in the district court but did not participate in the appeals that are the subject of the proceedings before this Court.

Salvatore Lopresti,* Joseph Cuciti, Christopher Witschel, Clemett Shacks, Brian Rodriguez, Jon Osteen, Raymond Cotton, William Beck, Steven Barrere, Lindsey Bledsoe, Howard Gussak, Marcial Mundo, Daniel Ortiz, Stuart Pray, Elizabeth Torres, Phillip Barnes, Sydney Chase, Michael Defrancisco, Richard Diaz, Kevin Lopez, Mario Machado, Michael McCabe, Raymond Mickens, Scott Rosebery, and James Cuffee were defendants in the district court, but did not participate in the appeals that are the subject of the proceedings before this Court.

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* Mr. Lopresti filed a notice of appeal but did not pay a filing fee or file a brief. His appeal was accordingly dismissed under Federal Rule of Appellate Procedure 31(c).

Omer Gavriel Marmari, Yaron Shmuel, Paul Kurzberg, Silvan Kurzberg, Javaid Iqbal, Ehab Elmaghraby, and Irum E. Shiekh were intervenors in the district court, but did not participate in the appeals that are the subject of the proceedings before this Court.

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IN THE

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NO. 15-1363

DENNIS HASTY AND JAMES SHERMAN,

Petitioners,

v.

AIIMER IQBAL ABBASI, *ET AL.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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BRIEF FOR PETITIONERS HASTY AND SHERMAN

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-163a) is published at 789 F.3d 218 (2d Cir. 2015).[1] The opinion of the district court (Pet. App. 164a-236a) is published at 915 F. Supp. 2d 314 (E.D.N.Y. 2013).

STATEMENT OF JURISDICTION

The court of appeals entered judgment on June 17, 2015. Pet. App. 1a. It denied rehearing and rehearing en

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[1] Except where otherwise indicated, citations are to the petition appendix in No. 15-1359, *Ashcroft* v. *Abbasi*.

banc on December 11, 2015. *Id.* at 237a. Hasty and Sherman filed a petition for a writ of certiorari on May 6, 2016, and this Court granted the petition on October 11, 2016. This Court has jurisdiction under 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Relevant provisions of the U.S. Constitution and Title 42 of the U.S. Code are set forth at pages 241a-243a in the appendix to the petition in No. 15-1363, *Hasty* v. *Abbasi*.

STATEMENT

This putative class action was filed by foreign nationals who were illegally present in the United States and detained following the 9/11 terrorist attacks. Respondents seek to impose personal damages liability on various federal officials—from the Attorney General to local prison wardens—under *Bivens* v. *Six Unknown Named Agents*, 403 U.S. 388 (1971), and for conspiracy under 42 U.S.C. § 1985(3).

I. Proceedings In District Court

"In the aftermath of the 9/11 attacks, the FBI and other agencies within the DOJ immediately initiated an immense investigation aimed at identifying the 9/11 perpetrators and preventing any further attacks." Pet. App. 7a. More than 4,000 FBI agents were dedicated to the investigation. *Ashcroft* v. *Iqbal*, 556 U.S. 662, 667 (2009). Hundreds of foreign nationals illegally in the United States, including respondents, were detained on immigration charges. *Ibid.* Respondents were housed in the Metropolitan Detention Center ("MDC") in Brooklyn, New York. Petitioners Hasty and Sherman were, re-

spectively, the Warden and Associate Warden for Custody at MDC.

A. Respondents' Claims for Damages

Filed in 2002, this action names as defendants former Attorney General John Ashcroft, former FBI Director Robert Mueller, former INS Commissioner James Ziglar (the "DOJ Defendants"), former MDC Warden Dennis Hasty, and former MDC Associate Warden for Custody James Sherman.

1. Following respondents' arrests, the FBI designated them as "of interest" or of "high interest" to the 9/11 investigation. Pet. App. 252a (¶ 1), 253a (¶ 4). Under Bureau of Prisons ("BOP") policy, detainees so classified had to be held under "'the most restrictive and secure conditions permitted.'" *Id.* at 50a-51a; see *Iqbal*, 556 U.S. at 667. Such detainees were also subject to a "hold-until-cleared" policy that precluded their release until the FBI cleared them of terrorism connections. Pet. App. 17a; see *id.* at 270a (¶ 55); J.A. 218-219, 240-242.

Consistent with those policies, respondents were confined in the "ADMAX SHU," a special wing of the MDC. See Pet. App. 10a; see also *id.* at 253a-254a (¶ 4). A total of 84 detainees were housed in that unit between September 14, 2001, and August 27, 2002. J.A. 49, 219. Respondents were detained for periods ranging from three to eight months. Pet. App. 2a.

2. The current allegations stem from the Fourth Amended Complaint ("Complaint"), filed after the Second Circuit remanded the case for reconsideration in light of *Ashcroft* v. *Iqbal*, *supra*. See *Turkmen* v. *Ashcroft*, 589 F.3d 542 (2d Cir. 2009). The Complaint does not challenge the legality of respondents' detention; their detention on immigration charges was concededly lawful.

See Pet. App. 252a(¶¶1-2), 263a(¶33.b). Respondents challenge only the conditions of their confinement. The courts below separated those into two categories—"official" conditions required by policy, and "unofficial" conditions reflecting unauthorized treatment by individual prison guards. *Id.* at 49a, 199a.

The "official" conditions were severe: BOP policy required detainees designated as "of interest" (or higher) to the terrorism investigation to be housed in the "most restrictive * * * conditions permitted." Pet. App. 50a-51a. That involved "'place[ment] in tiny cells for over 23 hours a day'"; the lights were "left on in their cells for 24 hours a day"; and they were "'prohibited from moving around the unit, using the telephone freely, using the commissary, or accessing MDC handbooks.'" *Id.* at 10a.

Respondents did not claim those conditions would be impermissible for genuine terrorism suspects. Oral Arg. at 1:36:58, *Turkmen* v. *Hasty*, No. 13-981 (2d Cir. May 1, 2014); Pet. App. 46a (conceding the "challenged conditions" could be imposed on those "with suspected ties to terrorism"). Respondents agree that whether those conditions could lawfully be imposed on suspects with actual terrorism connections "is not relevant." Br. in Opp. 29 n.11.

Instead, respondents' suit alleges that it was unlawful to impose those conditions on *them* because the FBI terrorism designations were wrong. Respondents allege that, although the FBI had designated them "of interest" to its investigation, they in fact had no terrorism connections. Pet. App. 51a-52a; see *id.* at 277a(¶69), 278a-279a(¶73). Respondents assert that Hasty and Sherman violated clearly established law because they supposedly "knew" the FBI's designations were unfounded, but failed to disregard the designations by imposing less-restric-

tive conditions (in violation of BOP policy) based on their own putative views. See *id.* at 51a-54a.

With respect to "unofficial" conditions, respondents allege "physical and verbal abuse" by individual guards. See Pet. App. 11a. Respondents allege that some guards slammed them into walls, twisted their arms, wrists, and fingers, and otherwise roughly handled them. *Ibid.* Respondents also allege that MDC guards referred to them as terrorists, threatened them with violence, made humiliating sexual comments during strip searches, and insulted their religion. *Ibid.* Respondents allege that guards called them "camel[s]" and "fucking Muslims." *Ibid.* Respondents do not claim that Hasty or Sherman observed or engaged in such conduct themselves. See *id.* at 54a-57a.

The Complaint incorporated by reference two reports from the Office of the Inspector General concerning the treatment of aliens detained in connection with the 9/11 investigation. J.A. 48; see Pet. App. 253a(¶3 n.1), 254a(¶5 n.2). The reports are reproduced at J.A. 34-416.[2] Released in 2003, those reports reflected investigative fieldwork from as early as March 2002. J.A. 49. They noted that the FBI was responsible for designating detainees as "of interest" to its 9/11 investigation, *id.* at 102, and that the restrictive conditions were imposed on such detainees pursuant to BOP policy, *id.* at 220. Regarding the unofficial conditions, the Inspector General's "investi-

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[2] Respondents incorporated the OIG reports "except where contradicted by the allegations" of the Complaint. *E.g.*, Pet. App. 253a(¶3 n.1). Respondents have identified only one instance of "a possible conflict between the * * * Complaint and either OIG Report," see C.A. Reply Br. of Pls.-Appellees-Cross-Appellants, at 24 n.6—on an issue not pertinent here.

gation [did] not uncover[ ] any evidence that the physical or verbal abuse was engaged in or condoned by anyone other than the correctional officers who committed it." *Id.* at 299 n.130.

3. The Complaint seeks damages under four theories. Counts 1, 2, and 6 assert *Bivens* claims. Count 1 alleges a due-process violation. The conditions of confinement, it asserts, had no legitimate objective and were therefore impermissibly punitive. Count 2 asserts an equal-protection violation, alleging respondents were held in restrictive conditions based on race, ethnicity, or national origin. Count 6 asserts that respondents were subject to unreasonable and punitive strip searches in violation of the Fourth and Fifth Amendments. Finally, Count 7 alleges that Hasty, Sherman, and the DOJ Defendants violated 42 U.S.C. §1985(3) by conspiring to violate respondents' equal-protection rights.[3]

B. The District Court's Ruling

The district court granted the DOJ Defendants' motions to dismiss, and denied Hasty's and Sherman's motions in relevant part. See Pet. App. 183a-236a.

1. The district court recognized that, since implying a damages action for constitutional violations in *Bivens*, 403 U.S. 388, this Court has extended that action to new contexts only twice, refusing every requested extension for the past three decades. Pet. App. 221a-222a. *Bivens*, the district court observed, will not be extended if "special factors" counsel hesitation. *Id.* at 222a. Special factors include "'military concerns,'" "'national security

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[3] Counts 3-5 were dismissed below, Pet. App. 19a-20a, 27a-29a, 203a-220a, and respondents have not sought further review.

concerns,'" and "'foreign policy considerations.'" *Id.* at 226a.

The district court recognized that this case involves an "extraordinary factual context." *Turkmen* v. *Ashcroft*, No. 02-cv-2307, 2006 WL 1662663, at *30 (E.D.N.Y. June 14, 2006). But it ruled that there was no reason to examine whether "special factors" counsel hesitation because respondents were not seeking to "extend" *Bivens* to a "new context." Courts, it asserted, had previously allowed prisoners to assert conditions-of-confinement, equal-protection, and Fourth Amendment claims under *Bivens*. See Pet. App. 192a-193a n.10, 203a n.15, 232a.

2. The district court also ruled that the Complaint satisfies the pleading standard of *Iqbal*, 556 U.S. 662. *Iqbal* requires the Complaint to "plausibly" plead "an entitlement to relief" and address "obvious alternative" explanations for the challenged conduct. *Id.* at 679, 682.

For the due-process claims based on "official" conditions (Counts 1 and 6), the court held that "punitive intent" could be inferred from the conditions themselves. Pet. App. 200a-201a.[4] Regarding unofficial conditions, the court saw no indication that Hasty or Sherman had mistreated prisoners or observed such abuse. But it found respondents' allegations of deliberate indifference sufficient. *Id.* at 201a-202a.

The district court also sustained the equal-protection claim (Count 2). It credited the allegation that Hasty and Sherman concluded that "the FBI had not developed any information" tying respondents to terrorism. Pet. App.

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[4] The court addressed the due-process challenge to strip searches in Count 6 together with the official-conditions challenge in Count 1. Pet. App. 231a n.30.

210a. From that, the court held, one could infer Hasty and Sherman imposed restrictive conditions based on race or religion.

The district court also upheld respondents' Fourth Amendment challenge to strip searches (Count 6), finding that the Complaint sufficiently alleged that those searches lacked "legitimate penological purpose." Pet. App. 232a-233a. Finally, the court held that respondents adequately pleaded a conspiracy under § 1985(3) because Hasty and Sherman had agreed to "implement[ ] the facially discriminatory harsh confinement policy" required by BOP. *Id.* at 234a-235a.

3. The district court denied qualified immunity. On the due-process conditions-of-confinement claims, the court found it clearly established in 2001 that pretrial detainees could not be subject to "punitive conditions of confinement." Pet. App. 202a-203a. It reached a similar conclusion on the equal-protection claim: "[E]xpressly singling out Arabs and Muslims for harsh conditions of confinement" violated clearly established law. *Id.* at 210a-211a. As for the Fourth Amendment strip-search claim, the court ruled that "clearly established" law proscribed searches that are "not reasonably related to a legitimate penological purpose." *Id.* at 233a. On the § 1985(3) claim, the court acknowledged that "it may not have been clearly established in 2001" that § 1985(3) reached conspiracies by federal officers. *Id.* at 235a. But it denied immunity because no official could believe it "'legally permissible'" to join a conspiracy to discriminate. *Ibid.*

4. The district court dismissed the claims against the DOJ Defendants, holding that the Complaint did not meet *Iqbal*'s requirements. Pet. App. 166a.

II. Proceedings In The Second Circuit

A. The Panel Decision

A divided panel affirmed in relevant part with respect to Hasty and Sherman, and reversed dismissal of the DOJ Defendants.

1. The panel majority did not dispute that, for more than three decades, this Court has refused to extend *Bivens* to any new contexts. The majority likewise agreed that "context" encompasses more than the identity of the constitutional right allegedly violated. But the majority ruled that the context here was not "new," and thus required no inquiry into whether special factors counsel hesitation. See Pet. App. 24a-25a.

When deciding whether a context is "new," the majority declared, courts should consider only (a) the "rights injured" and (b) the "mechanism of injury." Pet. App. 23a. The "rights injured" here, it stated, were "substantive due process and equal protection," and the "mechanism of injury" was "punitive conditions without sufficient cause." *Id.* at 24a-25a. Thus, the context of respondents' *Bivens* claims was "federal detainee Plaintiffs, housed in a federal facility, alleg[ing] that individual federal officers subjected them to punitive conditions." *Id.* at 24a.

The majority thus declined to consider whether national security, foreign relations, or other issues concerning the detention of foreign nationals following a terrorist attack presented "special factors" counselling hesitation. It did not consider whether special factors counsel hesitation before extending *Bivens* to claims that local jailers should have ignored *FBI* terrorism designations based on their own putative conclusions about the detainees' connections to an FBI terrorism investigation. And it did not ask "who should decide whether [to provide] such a

remedy" in this context, Congress or the courts. *Bush* v. *Lucas*, 462 U.S. 367, 380 (1983). Instead, the panel majority held that, because ordinary prisoners had been permitted to bring conditions-of-confinement claims in ordinary contexts, respondents could bring conditions-of-confinement claims here. Pet. App. 24a n.15.

2. The majority then held that the Complaint plausibly pleaded violations of clearly established rights consistent with *Iqbal* and qualified-immunity principles.

Due-process claims. With respect to the official conditions of confinement, the majority acknowledged that the conditions would be lawful for "individuals with suspected ties to terrorism." Pet. App. 46a. It did not dispute that BOP policy obligated Hasty and Sherman to impose those conditions on detainees designated by the FBI as "of interest" to the 9/11 investigation, including respondents. *Id.* at 50a-51a. And the majority admitted that Hasty and Sherman's "responsibility to carry out" BOP's directive "would not sustain liability." *Id.* at 51a.

The majority nonetheless held that the Complaint met *Iqbal*'s plausibility requirement. It found the Complaint plausibly alleged that, although Hasty and Sherman may have "*initially* believed that they would be housing only those detainees who were suspected of ties to terrorism," they "eventually knew that the FBI lacked any individualized suspicion for many" detainees but imposed restrictive conditions nonetheless. Pet. App. 52a. Hasty and Sherman allegedly received "regular written updates" describing why each detainee was arrested and "'the danger he might pose'" to the prison. *Ibid.* Because those updates did not link respondents to terrorism, the majority stated, the Complaint plausibly alleged that Hasty and Sherman "knew" the FBI's "of interest" designations were unfounded. *Id.* at 51a-54a. As a re-

sult, the official conditions "were 'not reasonably related to a legitimate goal,'" and it was plausible to infer they were imposed "with punitive intent." *Id.* at 50a.

The majority denied qualified immunity. At the time Hasty and Sherman acted, the majority stated, it was "clearly established that * * * a condition of pretrial detention not reasonably related to a legitimate governmental objective is punishment" that violates detainees' "constitutional rights." Pet. App. 58a. The majority did not address whether clearly established law required Hasty and Sherman to disregard FBI terrorism designations if they believed them erroneous.

With respect to the unauthorized abuse by MDC guards, the majority held that the claims met *Iqbal*'s plausibility requirement for Hasty but not Sherman. Pet. App. 56a-57a. The court invoked allegations that "Hasty avoided evidence of detainee abuse by 'neglecting to make rounds on the ADMAX [SHU].'" *Id.* at 56a. And it listed general allegations that Hasty became aware of abuse and "encouraged" harsh treatment by "referring to" detainees "as terrorists." *Id.* at 57a.

Equal-protection claims. On the equal-protection claims, the panel abandoned the district court's reasoning. Pet. App. 68a. Instead, it seized on allegations that Hasty and Sherman had approved a document—of unspecified date, purpose, and origin—allegedly stating that "'executive staff at the MDC had classified'" suspected terrorists "as 'High Security' based on * * * 'individualized assessment[s].'" *Ibid.* (quoting Pet. App. 279a(¶74)). That assertion was false, the panel stated, because Hasty and Sherman conducted no assessments. *Id.* at 68a-69a. Based on those "allegations of duplicity regarding the basis for confining the 9/11 detainees," the

majority found it "reasonable to infer * * * discriminatory intent." *Id.* at 69a.

The majority did not address the alternative explanation—that Hasty and Sherman were following a BOP policy that required the conditions of confinement for individuals the FBI designated "of interest" to its terrorism investigation. Nor did the majority address the possibility that the cited memorandum meant that *the FBI* had made the classifications.

The majority denied qualified immunity, holding that it "was clearly established * * * that it was illegal to * * * target [respondents] for mistreatment because of their race, ethnicity, religion, and/or national origin." Pet. App. 74a. The majority did not ask whether clearly established law required prison officials to disregard FBI terrorism designations.

Fourth Amendment claims. The majority upheld the Fourth Amendment strip-search allegations. Pet. App. 75a-80a. It concluded that respondents had sufficiently alleged that "Hasty and Sherman were personally involved in creating and executing" a strip-search policy. *Id.* at 77a. That policy, the panel held, "was not reasonably related to legitimate penological interests," because it required searches "when there was no possibility that [respondents] could have obtained contraband." *Ibid.*

Section 1985(3). Finally, the court addressed the allegation that Hasty and Sherman violated § 1985(3) by conspiring with DOJ officials to violate respondents' equal-protection rights. The majority acknowledged that, under the intra-enterprise conspiracy doctrine, members of a single entity like the DOJ cannot conspire for purposes of § 1985(3). Pet. App. 82a. And it agreed that BOP is part of the DOJ. See *id.* at 83a n.46. But it refused to de-

cide whether BOP and DOJ comprise one entity, remanding that issue to the district court. *Id.* at 83a.

The majority again denied qualified immunity. It did not dispute that there was uncertainty over whether § 1985(3) covered the alleged conspiracy given the intra-enterprise conspiracy doctrine. Pet. App. 83a & n.46. Nor did it deny that, at the time of these events, it was not clear that § 1985(3) extended to federal officers. *Id.* at 83a; see *Iqbal* v. *Hasty*, 490 F.3d 143, 177 (2d Cir. 2007), rev'd *sub nom. Ashcroft* v. *Iqbal*, 550 U.S. 662 (2009). But the majority held that federal officials could not reasonably believe it permissible to conspire to violate equal-protection rights. Pet. App. 83a-84a.

3. On respondents' cross-appeal, the majority reversed dismissal of the DOJ Defendants. Pet. App. 30a-49a, 61a-68a, 74a-75a.

B. Judge Raggi's Dissent

Judge Raggi issued a lengthy dissent. Pet. App. 86a-163a.

1. Judge Raggi observed that, for decades, this Court has refused to extend *Bivens* to any new context. Pet. App. 90a-92a. This Court's "reluctance to extend *Bivens* is grounded in our constitutional structure of separated powers." *Id.* at 91a. Proper analysis "focuses not on 'the merits of the particular remedy sought,' but on '*who should decide* whether such a remedy should be provided'"—Congress, or the judiciary. *Ibid.* (emphasis added). Here, Congress must decide whether to extend *Bivens* to this new context. *Id.* at 92a-118a.

Judge Raggi observed that, by finding this was not a "new context," the majority had avoided examining whether special factors counseled against *Bivens*' expansion. Pet. App. 93a-94a. And she objected to the major-

ity's "new standard" for determining whether a context is "new." *Id.* at 92a. "[C]ontext," Judge Raggi urged, could not be reduced to "general identification of a constitutional right or a mechanism of injury." *Id.* at 94a. Rather, special-factors analysis "demands consideration of all factors counseling for and against an implied damages action in the specific legal and factual circumstances presented." *Ibid.* "[W]here a proposed *Bivens* claim presents legal and factual circumstances that were *not* present in an earlier *Bivens* case, a new assessment is necessary because no court has yet made the requisite 'judgment' that a judicially implied damages remedy is 'the best way' to implement constitutional guarantees in *that* context." *Ibid.* "No court," Judge Raggi concluded, "has ever made the judgment that an implied damages remedy is the best way to implement constitutional guarantees of substantive due process, equal protection, and reasonable search when lawfully arrested illegal aliens challenge an executive confinement policy, purportedly made at the cabinet level in a time of crisis, and implicating national security and immigration authority." *Id.* at 94a-95a.

Judge Raggi found this case replete with special factors counselling hesitation. Pet. App. 101a. Respondents challenge "official executive policy," and a "*Bivens* action has never been considered a 'proper vehicle for altering an entity's policy.'" *Id.* at 102a; see *id.* at 102a-105a. Respondents' claims involved the "executive's immigration authority," a matter "'largely immune from judicial inquiry or interference.'" *Id.* at 106a-107a. And respondents' claims carried national-security implications. *Id.* at 107a-114a. Such matters, Judge Raggi urged, "'are rarely proper subjects for judicial intervention' in the absence of congressional authorization." *Id.* at 108a.

2. Judge Raggi disagreed with the majority's holding that the Complaint satisfied *Iqbal*'s pleading requirements. The allegations, she explained, were insufficient to support a plausible inference that Hasty and Sherman imposed the restrictive conditions without penological justification. The "obvious and more likely motivation" for imposing restrictive conditions on respondents was "national and prison security" concerns based on the FBI's "of interest" designations. Pet. App. 146a. Judge Raggi likewise would have granted immunity with respect to the official conditions of confinement because they did not violate clearly established law. *Id.* at 147a-148a & n.41.

Turning to equal protection, Judge Raggi found respondents' allegations materially indistinguishable from the allegations this Court rejected in *Iqbal*. Pet. App. 150a-152a. She again noted that the Complaint failed to address the "'obvious'" and "'more likely'" explanation for Hasty's and Sherman's conduct: Respondents "were restrictively confined pending FBI-CIA clearance for the legitimate purpose of ensuring national security." *Id.* at 157a. "[N]o clearly established law would have alerted every reasonable officer that it violated equal protection to confine these lawfully arrested illegal aliens pending clearance." *Id.* at 157a-158a. Because the Complaint did not state a plausible equal-protection violation, it likewise did not allege an actionable conspiracy to violate equal-protection rights in violation of §1985(3). *Id.* at 158a n.46.

Finally, Judge Raggi would have rejected respondents' Fourth Amendment claims. The Complaint failed to allege facts showing the challenged strip-search policy lacked a rational relationship to a legitimate government interest—"specifically, prison security." Pet. App. 159a-

160a. Given documented prison violence by terrorism suspects, "it was hardly irrational for prison authorities to conclude that persons under investigation for terrorist connections should be strip searched both randomly in their cells and whenever they were moved from one location to another." *Id.* at 161a.

C. The Six-Judge Dissent from Denial of Rehearing En Banc

The Second Circuit denied rehearing en banc, with six judges dissenting. The dissenters observed that this case made the Second Circuit the first court of appeals to imply "a *Bivens* damages action * * * for actions taken to safeguard our country in the immediate aftermath of the 9/11 attacks." Pet. App. 240a. The dissenters deemed it obvious that the context was "new" and involved sensitive matters—like immigration and national security—that rendered *Bivens*' expansion inappropriate. *Id.* at 243a-246a. And the panel majority had "avoid[ed] its obligation" to consider whether special factors counselled hesitation before extending *Bivens* to these "unprecedented legal and factual circumstances." *Id.* at 243a.

The dissenters disagreed with the panel's qualified-immunity analysis. Qualified immunity must be granted unless the rights asserted "were so clearly established with respect to the '*particular* conduct' and the '*specific* context' at issue that every reasonable official would have understood that his conduct was unlawful." Pet. App. 246a (second emphasis added). The panel cited no case providing such clarity regarding the particular conduct and specific context here. *Id.* at 247a.

Finally, the dissenters urged that the panel's decision diluted *Iqbal*'s requirement that plaintiffs "plead a plausible claim grounded in a factual basis." Pet. App. 248a. The panel, the dissenters urged, sustained the Complaint

based on "hypothesized possibilities" and "conclusory assumptions or insinuations." *Ibid.*

SUMMARY OF ARGUMENT

I. The judicially implied private right of action for damages against federal officers, first recognized in *Bivens* v. *Six Unknown Named Agents*, 403 U.S. 388 (1971), should not be extended to this new, and extraordinary, context.

A. This Court has cautioned that *Bivens* should not be extended to a new context where "special factors counsel hesitation"—where circumstances suggest that Congress, rather than the courts, should decide whether a damages action is appropriate. For more than three decades, this Court itself has refused to extend *Bivens* "to any new context or new category of defendants." *Corr. Servs. Corp.* v. *Malesko*, 534 U.S. 61, 68 (2001).

B.-C. The panel majority never considered whether special factors counselled hesitation before allowing the *Bivens* claims to proceed here. In the panel's view, it was not required to analyze special factors because the context of this case was not "new." It thus did not matter that this case arises from the Executive's response to an unprecedented terrorist attack and the detention of foreign nationals illegally in the United States. Nor did it matter that respondents seek damages from local jailers for failing to disregard *FBI* terrorism designations, and corresponding BOP confinement policies, based on their own putative terrorism assessments. Instead, evaluating the claims at a high level of generality, the panel held that this context was no different from a garden-variety conditions-of-confinement claim by ordinary prisoners in ordinary times. The panel's "new context" analysis defies precedent and common sense.

It also ignores all the differences between this context and ordinary prison-condition cases that give rise to special factors that should preclude *Bivens*' extension. For example, the claim that FBI terrorism designations were incorrect, and jailers should have second-guessed and ignored them, implicates matters related to national security, potentially sensitive intelligence information, and immigration policy, all of which are special factors that should foreclose a *Bivens* action. It also implicates grave concerns for the functioning of the Nation's law enforcement chain of command, particularly in times of national emergency. If there is to be a damages remedy in this context, Congress rather than the courts must provide it and define its boundaries.

II. Hasty and Sherman are entitled to qualified immunity. To overcome qualified immunity, a plaintiff must show that the challenged conduct violated "clearly established" rights—that no reasonable officer could have thought the challenged conduct lawful in the circumstances he confronted.

A. Respondents' due-process and equal-protection claims are predicated on Hasty and Sherman's failure to disregard FBI terrorism designations, and a facially valid BOP policy, by imposing less restrictive conditions based on their own subjective assessment of respondents' terrorism connections. But no clearly established law required such action. The panel reached a contrary conclusion only by analyzing the rights at issue at an impermissibly high level of generality that ignored the specific context Hasty and Sherman confronted.

B. The panel denied immunity on the Fourth Amendment strip-search claims because, under clearly established law, such searches must be rationally related to legitimate government purposes. The panel ruled that

the searches did not meet that standard because they allegedly occurred when "'there was no possibility that [respondents] could have obtained * * * contraband.'" Pet. App. 78a. But a reasonably competent officer could have thought the strip searches—which occurred when respondents were transported to and from meetings and in and out of their cells—were related to the legitimate interest in prison security. Just two years earlier, a terrorism detainee had severely injured a guard—causing permanent brain damage—by attacking him with a knife fashioned from a contraband comb.

C. Hasty and Sherman are also entitled to immunity on respondents' § 1985(3) claim. Apart from respondents' failure to establish the violation of clearly established equal-protection rights, it was not clearly established in 2001 that § 1985(3) even applied to federal officers. Nor was it clearly established that coordinated action by employees within the Justice Department—of which BOP is a part—could constitute a prohibited "conspiracy" within the meaning of § 1985(3).

III. Finally, the Complaint does not "'state a claim to relief that is *plausible* on its face.'" *Ashcroft* v. *Iqbal*, 556 U.S. 662, 668 (2009) (emphasis added).

A. Respondents' due-process and equal-protection claims based on "official" conditions fall far short. The Complaint fails to dispel the "obvious alternative" and "more likely" lawful explanation for Hasty and Sherman's decision to impose restrictive conditions of confinement: They were complying with the FBI's terrorism designations and BOP policies. That respect for coordinate agencies with expertise and a binding prison-security policy—not discriminatory motive or arbitrary treatment—is the single most plausible explanation.

B. The strip-search claims fail because they do not plausibly allege Hasty's and Sherman's personal involvement in creating and implementing the supposed policy. (Indeed, the panel had to infer that the unwritten policy even existed.) The Complaint contains no factual allegations making it plausible that Hasty and Sherman reviewed and approved that unwritten policy or that they were aware that it would result in irrational strip searches.

C. The panel dismissed the allegations about "unofficial" conditions—*i.e.*, unauthorized misconduct by individual prison guards—against Sherman, recognizing that they failed to show his personal knowledge and involvement; respondents have not sought further review. But there is no allegation that Hasty personally participated in or even witnessed the alleged abuses either. The panel's perfunctory recitation of a handful of allegations in the Complaint—ignoring all the more obvious explanations—was insufficient to establish the requisite personal involvement.

ARGUMENT

The panel decision in this case improperly extends *Bivens* to a new context, subjecting local jailers to personal liability for failing to countermand FBI terrorism designations based on their own putative views. It denied qualified immunity by invoking precisely the sort of analysis this Court has repeatedly condemned. And its approach to "plausibility" under *Iqbal* cannot be reconciled with the standards that case sets forth.

I. The Court Of Appeals Improperly Extended The Judicially Implied *Bivens* Action To A New Context

For more than three decades, this Court has "consistently refused to extend *Bivens* liability to any new context or new category of defendants." *Corr. Servs. Corp.* v. *Malesko*, 534 U.S. 61, 68 (2001). The decision below nonetheless extends *Bivens* to a new context for which it is ill-suited—"actions taken to safeguard our country in the immediate aftermath of the 9/11 attacks." Pet. App. 240a. Foreign nationals, it held, may pursue *Bivens* claims for damages against *local jailers* on the theory that they should have disregarded the *FBI*'s terrorism designations and BOP-mandated detention policies in favor of their own putative assessments of the detainees' ties to terrorism. The panel majority extended *Bivens* only by improperly refusing to consider "special factors" that would preclude *Bivens*' expansion, asserting that the context here was not "new." If foreign nationals are to be afforded a damages action allowing them to litigate the validity of FBI terrorism designations—and to impose personal liability on local jailers—Congress, not the courts, must decide to create it.

A. This Court Is Properly Reluctant To Extend *Bivens* in View of "Special Factors"

In *Bivens* v. *Six Unknown Named Agents*, 403 U.S. 388 (1971), this Court "recognized for the first time an implied private action for damages against federal officers alleged to have violated a citizen's constitutional rights." *Malesko*, 534 U.S. at 66. The plaintiff in *Bivens* alleged that federal agents had conducted a warrantless search and arrested him in violation of the Fourth Amendment. 403 U.S. at 389. The Court implied a damages action against the officers under the Fourth Amend-

ment. *Id.* at 397. This Court, however, has repeatedly cautioned that, "[b]efore a *Bivens* remedy may be fashioned" for a new context, "a court must take into account any 'special factors counselling hesitation'" in the absence of affirmative action by Congress. *Chappell* v. *Wallace*, 462 U.S. 296, 298 (1983).

1. In the decade following *Bivens*' judicial creation of an "implied private action for damages" under the Fourth Amendment, this Court extended that cause of action twice. It recognized a *Bivens* action for unconstitutional discrimination by a U.S. Congressman, *Davis* v. *Passman*, 442 U.S. 228 (1979), and one for Eighth Amendment violations by prison guards in the ordinary prison context, *Carlson* v. *Green*, 446 U.S. 14 (1980).

The Court has not extended *Bivens* in the three-and-a-half decades since. The Court declined to extend *Bivens* to "claims of First Amendment violations by federal employers, *Bush* v. *Lucas*, 462 U.S. 367 (1983), harm to military personnel through activity incident to service, *United States* v. *Stanley*, 483 U.S. 669 (1987); *Chappell* v. *Wallace*, 462 U.S. 296 (1983), and wrongful denials of Social Security disability benefits, *Schweiker* v. *Chilicky*, 487 U.S. 412 (1988)." *Wilkie* v. *Robbins*, 551 U.S. 537, 550 (2007). And it has "seen no case for extending *Bivens* to claims against federal agencies, *FDIC* v. *Meyer*, 510 U.S. 471 (1994), or against private prisons, [*Malesko*, 534 U.S. at 61]." *Wilkie*, 551 U.S. at 550.

That reluctance to extend *Bivens* is well-founded. This Court has "repeatedly said that a decision to create a private right of action is one better left to legislative judgment in the great majority of cases." *Sosa* v. *Alvarez-Machain*, 542 U.S. 692, 727 (2004). "'Congress is in a better position to decide whether or not the public interest would be served'" by imposing a "'new substan-

tive legal liability.'" *Schweiker*, 487 U.S. at 412, 426-427. "[I]mplied causes of action" are "disfavored." *Ashcroft* v. *Iqbal*, 556 U.S. 662, 675 (2009). This Court thus has admonished that courts must "'pay[] particular heed'" not to expand *Bivens* to new contexts if "'special factors counsel[] hesitation.'" *Wilkie*, 551 U.S. at 550.

2. The special-factors inquiry turns not on "*the merits* of the particular remedy," but on "*who should decide* whether [to provide] such a remedy"—Congress or the courts. *Bush*, 462 U.S. at 380 (emphasis added). For example, courts will not imply a *Bivens* action touching on "military, national security, or intelligence" matters. *Doe* v. *Rumsfeld*, 683 F.3d 390, 394 (D.C. Cir. 2012). In those areas, Congress's and the Executive's competence to balance competing objectives is at its apogee, while the judiciary's is at its nadir. *Ibid.*; see *Haig* v. *Agee*, 453 U.S. 280, 292 (1981) ("Matters intimately related to * * * national security are rarely proper subjects for judicial intervention.").

In *Davis*, this Court implied a *Bivens* remedy for a former congressional staffer claiming gender discrimination in violation of the Fifth Amendment. 442 U.S. at 230-231, 248-249. Four years later, in *Chappell*, the Court refused to extend *Bivens* to claims by Navy sailors who likewise alleged employment discrimination. 462 U.S. at 304. The Court did not deem the two contexts identical in view of the identity of the legal claims. Instead, it looked to an additional consideration not present in *Davis*—the military context—and concluded that it counseled a different result. *Id.* at 300-301, 304. When such "special factors" are present, Congress is "'in a far better position than a court to evaluate the impact of a new species of litigation,'" and courts thus will not imply

a new damages remedy. *Lebron* v. *Rumsfeld*, 670 F.3d 540, 553 (4th Cir.), cert. denied, 132 S. Ct. 2751 (2012).

While this Court has cautioned against extending *Bivens* to "new contexts," it has not articulated a test for determining whether a "context" is "new." The courts of appeals, however, have generally adopted a common-sense approach, "construe[ing] 'context' * * * 'to reflect a potentially recurring scenario that has similar legal and factual components.'" *Meshal* v. *Higgenbotham*, 804 F.3d 417, 424 (D.C. Cir. 2015) (quoting *Arar* v. *Ashcroft*, 585 F.3d 559, 572 (2d Cir. 2009) (en banc), cert. denied, 560 U.S. 978 (2010)); see *De La Paz* v. *Coy*, 786 F.3d 367, 372 (5th Cir. 2015); *Mirmehdi* v. *United States*, 689 F.3d 975, 981 (9th Cir. 2011), cert. denied, 133 S. Ct. 2336 (2013).

That approach functions reasonably so long as courts, in comparing "legal and factual" scenarios, consider differences between the current case and prior ones that may give rise to "special factors counselling hesitation." As Judge Raggi explained, "where a proposed *Bivens* claim presents legal and factual circumstances that were *not* present in an earlier *Bivens* case, a new assessment" of whether special factors counsel hesitation "is necessary because no court has yet made the requisite 'judgment' that a judicially implied damages remedy is 'the best way' to implement constitutional guarantees in *that* context." Pet. App. 94a (quoting *Wilkie*, 551 U.S. at 550).

B. The Second Circuit's "New Context" Analysis Eviscerates Special-Factors Review

This case arises from a national-security response to the 9/11 terrorist attacks. Respondents are foreign nationals, illegally in the United States, who were detained as part of the investigation into that attack. Because the FBI designated them as "of interest" or of "high inter-

est" to its investigation, *e.g.*, Pet. App. 302a(¶143), BOP policy required that respondents be confined in the "most restrictive and secure conditions permitted," *id.* at 50a-51a. Respondents do not challenge the legality of that policy itself. Rather, they claim that the imposition of restrictive confinement conditions on *them* violated due process and equal protection. Respondents allege that, while Hasty and Sherman may have "*initially* believed that they would be housing only those detainees who were suspected of ties to terrorism," they "*eventually* knew that the FBI lacked any individualized suspicion for many" detainees held in restrictive confinement, *id.* at 52a (second emphasis added), yet "continued to detain them" in those conditions, *id.* at 53a. Essentially, respondents seek to hold *local jailers* liable under *Bivens* because they failed to reject *FBI terrorism designations*, and did not disregard the corresponding confinement conditions mandated by *BOP policy*, based on their own putative views about respondents' ties to terrorism.

1. The panel majority refused to consider whether "special factors" counselled against extension of the *Bivens* action to this context. The majority declined to consider that this case arises from a national-security response to an unprecedented terrorist attack. It did not address whether special factors might exist here because the case implicates FBI terrorism designations—or that the claims rest on the theory that local jailers were obligated to disregard them. It did not consider whether permitting a case like this to proceed might touch on issues of national security, require inquiry into intelligence information, or affect foreign relations. Nor did it ask "who should decide whether [to provide] such a remedy" in this context, Congress or the courts. *Bush*, 462 U.S. at 380.

Instead, the panel held that the context was not "new"—that the case "stands firmly within a familiar *Bivens* context." Pet. App. 25a. But it reached that result only by adopting a highly generalized test for determining whether a *Bivens* context is "new." A context is not "new," the majority held, if (a) the "rights injured" and (b) the "mechanism of injury" match those in prior *Bivens* actions. *Id.* at 23a. Applying that test, the panel identified the injured rights as "substantive due process," "equal protection," and "Fourth Amendment" rights. *Id.* at 24a, 28a-29a. And it identified the "mechanism of injury" as "punitive conditions without sufficient cause" and "an unreasonable search performed by a prison official." *Id.* at 24a-25a, 28a.

The panel majority thus defined the "context" here as "federal detainee[s] * * * alleg[ing] that individual federal officers subjected them to punitive conditions" or "subjected them to unreasonable searches." Pet. App. 24a, 28a. At that level of abstraction, the panel found no difference between a run-of-the-mill prisoner suit alleging "punitive conditions" or "unreasonable searches" and the extraordinary context here—the claim that jailers should be liable for deferring to the FBI's terrorism designations for detained foreign nationals in the wake of 9/11.

That approach utterly decontextualizes "context." "At a sufficiently high level of generality," any case can be analogized to another. *Arar*, 585 F.3d at 572. The approach also divorces the "context" inquiry from its purpose. The point is to determine whether courts have *already* conducted a "special factors" analysis addressing the same considerations, rendering a new analysis unnecessary. See Pet. App. 94a (Raggi, J., dissenting). Courts may have allowed *Bivens* suits by "federal detainee[s]" based on garden-variety allegations that "federal officers

subjected them to punitive conditions." *Id.* at 24a-25a, 28a-29a. But that does not mean courts have considered whether "special factors" counsel against judicial implication of a *Bivens* action for claims touching on national security, or seeking to impose personal liability on jailers for respecting FBI terrorism designations.

The cases cited by the panel majority illustrate the problem. For example, the panel cited *Cale* v. *Johnson*, 861 F.2d 943 (6th Cir. 1988), as holding that "'a *Bivens* action may be brought by a federal prisoner, alleging violations of his right to substantive due process.'" Pet. App. 26a. But *Cale* concerned allegations that a prison official had "plant[ed] illegal drugs" on an inmate for "retaliatory purposes." 861 F.2d at 948. Other cited cases involved familiar allegations of deliberate indifference to medical needs—from guards "delay[ing] for too long" in transferring prisoners to a hospital, *Carlson*, 446 U.S. at 16 n.1, to denying a prisoner "access to his glaucoma medication," *Thomas* v. *Ashcroft*, 470 F.3d 491, 494 (2d Cir. 2006).

That special factors did not counsel hesitation in those contexts says nothing about whether special factors counsel hesitation here—where detained foreign nationals unlawfully present in the United States following terrorist attacks seek to hold local jailers liable for not disregarding the FBI's terrorism designations and the BOP's corresponding mandatory confinement conditions. If this Court's admonition that courts must consider special factors before extending *Bivens* to new "contexts" means anything, courts cannot equate the unprecedented context here with an ordinary conditions-of-confinement challenge by ordinary inmates in ordinary times.

2. The Second Circuit's "new context" framework defies this Court's precedents. As noted above, *Davis*

implied a *Bivens* remedy to permit a former congressional staffer to assert gender discrimination. 442 U.S. at 230-231, 248-249. But *Chappell* foreclosed a similar claim by Navy sailors. 462 U.S. at 297, 304. Under the Second Circuit's "source of right"/"mechanism of injury" formulation, *Chappell* would not have been a new "context." In both *Chappell* and *Passman*, the source of the right (Fifth Amendment) and the mechanism of injury (discriminatory employment actions) were the same. But this Court recognized that *Chappell* arose within "the framework of the military establishment," an area where Congress and not the courts has particular authority and expertise. 462 U.S. at 301-303. It thus presented a new context where special factors precluded *Bivens*' expansion.[5]

Likewise, although this Court implied an Eighth Amendment remedy against federal prison officials in *Carlson*, 446 U.S. at 17, it refused to extend that remedy to suits against private corporations operating a prison under a BOP contract in *Malesko*, 534 U.S. at 63. The legal and factual differences between publicly employed corrections officers and private corporations, the Court ruled, counseled against *Bivens*' expansion. See *id.* at 70-74.

The Second Circuit's "new context" framework thus defies precedent and common sense. By treating cases

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[5] The Second Circuit characterized *Chappell* as "focus[ing] on the special nature of the employer-employee relationship in the military—or, in other words, the mechanism of injury." Pet. App. 24a n.15. But the Second Circuit ignored the similarly special nature of any "mechanism of injury" here, disregarding national-security concerns and the different roles of the FBI and local jailers in identifying terrorist threats. See *id.* at 24a, 28a.

with different legal and factual circumstances as the same "context," it evades analysis of considerations critical to whether "special factors" counsel against judicial implication of a remedy Congress has not authorized. A "new context" test that does not acknowledge the differences between a run-of-the-mill conditions-of-confinement case by an ordinary prisoner and the exceptional circumstances at issue here is no test at all. Such an approach "invite[s]" *Bivens'* expansion into "every sphere of legitimate governmental action." *Wilkie*, 551 U.S. at 561.

C. This Case Is Replete with Special Factors

This action arises from a national-security response to the most devastating terrorist attack "'in the history of the American Republic.'" *Iqbal*, 556 U.S. at 685. "[T]he executive's exercise of national security authority * * * will be *the* critical focus" of the case. Pet. App. 108a. Special factors thus resonate throughout this context.

1. "Matters intimately related to * * * national security are rarely proper subjects for judicial intervention." *Haig*, 453 U.S. at 292. Consequently, where the allegations involve "the military, national security, or intelligence," special factors counsel against extending *Bivens*. *Doe*, 683 F.3d at 394; see also *Meshal*, 804 F.3d at 425-426.

For example, in *Lebron*, the Fourth Circuit refused to extend *Bivens* to claims against Department of Defense officials arising from a citizen's seizure and detention as an enemy combatant. Special factors counseled hesitation because a *Bivens* remedy would "'intrude upon the authority of the Executive in military and national security affairs.'" 670 F.3d at 549. Likewise, in *Doe*, the D.C. Circuit declined to extend *Bivens* to a case that "would require a court to delve into the military's policies re-

garding the designation of detainees as * * * 'enemy combatants,' as well as policies governing interrogation techniques." 683 F.3d at 394, 396.

Those same considerations apply here. This case would require courts to second-guess FBI terrorism designations for foreign nationals and decide appropriate conditions of confinement. Whether the judiciary should be placed in the position of "review[ing] and disapprov[ing] sensitive * * * decisions" of that sort is a decision "'more appropriate[ ] for those who write the laws'" than "'for those who interpret them.'" *Lebron*, 670 F.3d at 551-552. That is so not only because constitutional authority to create causes of action rests with the political branches, "but also because that's where the expertise lies." *Vance* v. *Rumsfeld*, 701 F.3d 193, 200 (7th Cir. 2012) (en banc), cert. denied, 133 S. Ct. 2796 (2013).

2. Unlike typical prison cases, moreover, cases like this one often involve classified or sensitive information. The propriety of FBI terrorism designations, and the assertion that Hasty and Sherman "knew" the FBI was wrong, are linchpins of respondents' claims. Litigating the merits thus could "require judicial intrusion into matters of national security and sensitive intelligence information." *Wilson* v. *Libby*, 535 F.3d 697, 710 (D.C. Cir. 2008), cert. denied, 557 U.S. 919 (2009). "Even a small chance that some court will order disclosure of a source's identity could well impair intelligence gathering and cause sources to 'close up like a clam.'" *CIA* v. *Sims*, 471 U.S. 159, 175 (1985).

That consideration has special force where, as here, the plaintiffs are foreign nationals. See *Arar*, 585 F.3d at 576. The FBI's assessment of terrorism connections in such cases may rest on "exchanges among the ministries and agencies of foreign countries on diplomatic, security,

and intelligence issues." *Ibid.* "Even the probing of these matters" may deter foreign nations from "sharing intelligence resources to counter terrorism." *Ibid.*; see *Lebron*, 670 F.3d at 554. Because the legislature is better equipped to evaluate those risks, the potential involvement of sensitive information likewise weighs dispositively against *Bivens*' expansion. *Lebron*, 670 F.3d at 554.

Respondents' effort to deny that risk proves the opposite. Respondents note that, according to the Complaint, "there was no reason to suspect [respondents] of any connection to terrorism," and Hasty and Sherman knew it. Br. in Opp. 20. On a motion to dismiss, they assert, those allegations must be taken as true. *Id.* at 19-20. But respondents will have the burden of proving that the FBI had no intelligence information tying them to terrorism, and defendants may wish to prove the opposite. Litigating such issues threatens to "require judicial intrusion into matters of national security and sensitive intelligence information." *Libby*, 535 F.3d at 710. Even uncertainty over the need to consider sensitive information at any point in the litigation "is reason for caution" before extending *Bivens*. *Meshal*, 804 F.3d at 426; see *Lebron*, 670 F.3d at 553 (special factors preclude *Bivens*' extension in part because "[a]ny defense" to the claims would involve terrorism "intelligence"); *Stanley*, 483 U.S. at 682 (noting "the prospect of compelled depositions and trial testimony by military officers" in concluding that special factors preclude *Bivens*' expansion to the military context).[6]

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[6] The availability of the state-secrets privilege does not substitute for such considerations. It may be that "courts can—with difficulty and resourcefulness—consider" that doctrine to protect state secrets "when there is an unflagging duty to exercise jurisdiction." *Arar*,

3. As the panel acknowledged, this case also has a "major immigration law component." Pet. App. 8a. That, too, is a special factor. "[A]ny policy toward aliens is * * * so exclusively entrusted to the political branches of government as to be largely immune from judicial inquiry or interference." *Harisiades* v. *Shaughnessy*, 342 U.S. 580, 588-589 (1952). Immigration policy is replete with "foreign-policy objectives and * * * foreign-intelligence products and techniques." *Reno* v. *Am.-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 490-491 (1999). The implication of "immigration issues" further "'counsels hesitation' in extending *Bivens*" here. *Mirmehdi*, 689 F.3d at 982; see *De La Paz*, 786 F.3d at 375.

4. This case implicates a special factor of particular salience to lower-level officials assigned sensitive duties in the uncertainty that can follow a national emergency—the ability to rely on the chain of command and the expertise of coordinate agencies. The proper functioning of law enforcement, even in ordinary times, depends on subordinate officers following orders and policies issued by superiors. Cf. *United States* v. *Kisala*, 64 M.J. 50, 51-52 (C.A.A.F. 2006). Yet the decision below seeks to impose liability on local jailers because they did not disregard *terrorism* designations made by the *FBI*—an agency with far more information and experience in terrorism-related matters—in favor of their own putative assessments of prisoners' terrorism connections.

The very notion of chain of command cannot survive if lower-level officers must face the prospect of liability for

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585 F.3d at 575-576. But courts should not recognize a cause of action that will require them to do so unless "the legislative branch has authorized that course." *Lebron*, 670 F.3d at 554; see *Amr*, 585 F.3d at 576.

failing to countermand facially lawful orders from supervisors and designations by agencies with intelligence and expertise that the lower-level officials lack. If such a damages action is to be recognized, Congress and not the courts must create it. Cf. *Chappell*, 462 U.S. at 304 (refusing to recognize a *Bivens* action that would "disrupt[ ]" the "special relationship" between a "soldier [and] his superiors" (quotation marks omitted)).

Here, moreover, respondents deploy *Bivens* to challenge what they characterize as national-security "policy" promulgated by senior Executive Branch officials. *E.g.*, Pet. App. 255a(¶6); see *id.* at 244a. But "the *Bivens* remedy * * * ha[s] never [been] considered a proper vehicle for altering an entity's policy." *Malesko*, 534 U.S. at 74; see Ashcroft Pet., No. 15-1359, at 17-18. If suing senior Executive officials for promulgating policy is not a legitimate basis for a *Bivens* action, then suing lower-level officials for following that policy is not either.

5. Finally, the "[c]ongressional attention" to the constitutional violations alleged here has been "frequent and intense." *Schweiker*, 487 U.S. at 425. The Office of the Inspector General issued lengthy and detailed reports. Pet. App. 115a-117a (Raggi, J., dissenting); see J.A. 34-416. Yet "[a]t no point did Congress choose to extend * * * the kind of remedies that respondents seek in this lawsuit." *Schweiker*, 487 U.S. at 426. Congress's decision not to provide a remedy itself confirms that this Court should not imply one. *Id.* at 423; see *Lebron*, 670 F.3d at 551-552; *Vance*, 701 F.3d at 200-201.

II. Hasty And Sherman Are Entitled To Qualified Immunity

Federal officials are entitled to qualified immunity so long as "'their conduct does not violate clearly established statutory or constitutional rights.'" *Pearson* v.

Callahan, 555 U.S. 223, 231 (2009). The "clearly established" rights inquiry must account for the specific circumstances the officer confronted. "To be clearly established, a right must be sufficiently clear that '*every* "reasonable official would [have understood] that *what he is doing* violates that right."'" *Reichle* v. *Howards*, 132 S. Ct. 2088, 2093 (2012) (emphasis added). "[I]f officers of reasonable competence could disagree on [the] issue, immunity should be recognized." *Malley* v. *Briggs*, 475 U.S. 335, 341 (1986).

"[I]mmunity thus may be denied only if "'existing precedent * * * placed'" the answer "'beyond debate.'" *Reichle*, 132 S. Ct. at 2093. Although the inquiry is "objective"—subjective good faith is irrelevant, *Harlow* v. *Fitzgerald*, 457 U.S. 800, 818 (1982)—qualified immunity "gives government officials breathing room to make reasonable but mistaken judgments * * * . Properly applied, it protects 'all but the plainly incompetent or those who knowingly violate the law.'" *Ashcroft* v. *al-Kidd*, 563 U.S. 731, 743 (2011). The decision below defies those standards.

A. The Complaint Does Not Plead Violations of Clearly Established Due-Process and Equal-Protection Rights

According to the Complaint, Hasty and Sherman violated respondents' due-process and equal-protection rights by keeping them in restrictive conditions. Pet. App. 49a-54a, 68a-73a. No one denies that *the FBI* had designated respondents as "of interest" to its 9/11 investigation. *Id.* at 16a-17a, 51a. Nor does anyone dispute that BOP policy mandated that all detainees so designated be housed in the "'most restrictive * * * conditions permitted.'" *Id.* at 50a-51a. The panel recognized that "national security concerns could justify detaining those

individuals with suspected ties to terrorism in these challenged conditions" for a whole "litany of reasons." *Id.* at 46a; see *id.* at 143a-144a. The panel thus agreed that Hasty and Sherman's execution of that policy itself "would not sustain liability." *Id.* at 51a.

1. The panel majority nonetheless held that Hasty and Sherman could be liable because, according to the Complaint, they became "'aware that the FBI had not developed any information'" tying respondents "'to terrorism.'" Pet. App. 51a. Hasty and Sherman, the panel presumed, were obligated to overrule the FBI's terrorism designations, and place respondents in less restrictive conditions, based on their amateur assessments of respondents' connection to the 9/11 investigation. *Id.* at 51a-52a.

Setting aside the implausibility of the Complaint's allegations—that local jailers had the information and expertise to "know" the FBI's terrorism designations were wrong—the allegations identify no violation of clearly established law. The panel cited no authority, and certainly no "clearly established law," declaring that local jailers are constitutionally obligated to reject FBI terrorism designations in favor of their own putative assessments. Looking at the "'particular conduct'" alleged, in the "'specific context'" in which Hasty and Sherman acted, *Mullenix* v. *Luna*, 136 S. Ct. 305, 308 (2015), the claim that the Constitution required them to defy BOP policy and FBI designations was hardly "'beyond debate.'" *Ibid.*

To the contrary, most "reasonably competent" prison officials would have believed they were *required* to respect the FBI's designations, whatever their own subjective beliefs. "[M]ade at BOP headquarters," the policy requiring "highly restrictive conditions" for anyone "of

interest" to the FBI's 9/11 terrorism investigation was facially constitutional. Pet. App. 31a, 50a-51a. And the determination that respondents were "of interest" to the FBI's investigation came from the FBI, the agency that has domestic and foreign intelligence information and was charged with running the investigation. Hasty and Sherman, by contrast, had no role in the 9/11 investigation. They had no expertise in terrorism matters. And they had no reason to receive all intelligence information the FBI might have.

Under those circumstances, the contention that "every reasonable official would have understood" that these jailers were constitutionally obligated to overrule the FBI's designations and the BOP's policy based on their own supposed subjective beliefs defies credulity. See *Reichle*, 132 S. Ct. at 2093.[7]

2. The Second Circuit reached the opposite conclusion only by changing the question. For the due-process claims relating to official conditions, it denied immunity because it was clearly established that "a condition of pretrial detention not reasonably related to a legitimate governmental objective is punishment in violation of the constitutional rights of detainees." Pet. App. 58a. That framing of the inquiry contravenes this Court's repeated admonition "'not to define clearly established law at a high level of generality.'" *Mullenix*, 136 S. Ct. at 308. The "dispositive inquiry in determining whether a right is clearly established is whether it would be clear to a

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[7] If anything, cases suggest the opposite. In *Brady* v. *Dill*, 187 F.3d 104 (1st Cir. 1999), for example, the court held that "subjective belief" in an arrestee's innocence "is generally insufficient to justify a police officer's unilateral release of a person who has been lawfully arrested pursuant to a valid judicial order." *Id.* at 113.

reasonable officer that *his conduct* was unlawful *in the situation he confronted.*" *Saucier* v. *Katz*, 533 U.S. 194, 202 (2001) (emphasis added). The panel's formulation excludes any consideration of the "situation"—the FBI terrorism designations and BOP-mandated policy in the wake of an unprecedented terrorist attack—that Hasty and Sherman "confronted."

In *Anderson* v. *Creighton*, 483 U.S. 635 (1987), this Court held that qualified immunity may not be denied in a Fourth Amendment case simply because the right to be free from unreasonable searches is clearly established by the Fourth Amendment. *Id.* at 639. If the test were applied "at this level of generality," plaintiffs "would be able to convert the rule of qualified immunity * * * into a rule of virtually unqualified liability simply by alleging violation of extremely abstract rights." *Ibid.* Consequently, this Court requires "that the right the official is alleged to have violated must have been 'clearly established' in a more particularized, and hence relevant, sense." *Id.* at 640. The right's "contours" must have been so clear that any reasonably competent officer would have understood that his conduct was unlawful in the situation he confronted. *Ibid.*

The panel's contention that rights "do[ ] not vary with the surrounding circumstances," Pet. App. 49a, does not justify the contrary approach. However attractive that may sound in the abstract, whether conduct violates rights—and thus the rights' scope—*does* depend on circumstances. The right to be free from unreasonable searches in some sense may not "vary" with context. But whether a search is "unreasonable"—and thus violates the plaintiff's rights—*does* depend on circumstances. *Anderson*, 483 U.S. at 640-641. This Court thus evaluates immunity by addressing whether the challenged

conduct was obviously unlawful given the specific situation the officers confronted.[8]

The court of appeals repeated its error by asserting that *Bell* v. *Wolfish*, 441 U.S. 520 (1979), made it "clear that a condition of pretrial detention not reasonably related to a legitimate governmental objective is punishment in violation of the constitutional rights of detainees." Pet. App. 58a. *Wolfish* merely states that legal principle as a "general proposition." *al-Kidd*, 563 U.S. at 742. Indeed, *Wolfish rejected* the constitutional challenges there (*e.g.*, that "double-bunking" inmates in the same cell violated due process). 441 U.S. at 541. It is anyone's guess how *Wolfish* "clearly establishes" that Hasty and Sherman were required to disregard the FBI's terrorism designations and substitute their own supposed beliefs.[9]

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[8] See, *e.g.*, *Mullenix*, 136 S. Ct. at 309 (addressing whether clearly established law prohibited shooting "a reportedly intoxicated fugitive, set on avoiding capture through high-speed vehicular flight, who twice during his flight had threatened to shoot police officers, and who was moments away from encountering an officer"); *Wood* v. *Moss*, 134 S. Ct. 2056, 2068 (2014) (addressing whether clearly established law required "Secret Service agents engaged in crowd control * * * 'to ensure that groups with different viewpoints are at comparable locations at all times'").

[9] The panel also relied on the Second Circuit's earlier decision in *Iqbal* v. *Hasty*, 490 F.3d 143 (2d Cir. 2007), rev'd *sub nom. Ashcroft* v. *Iqbal*, 556 U.S. 662 (2009), as having "denied qualified immunity with respect to a materially identical conditions claim." Pet. App. 48a. But that earlier ruling suffers from the same defect as the decision below—it improperly concluded that the specific "context" was irrelevant. 490 F.3d at 169. The court's ruling, moreover, does not bind this Court. Whether the conduct here violated clearly established law is one of the questions this Court granted review to address. Pet. i, in No. 15-1363.

The panel majority's equal-protection analysis suffers from the same defect. The majority invoked a general standard: "[I]t was clearly established * * * that it was illegal to hold individuals in harsh conditions of confinement or otherwise target them for mistreatment because of their race, ethnicity, religion, and/or national origin." Pet. App. 74a. The panel never addressed whether any reasonable officer would understand that the actions Hasty and Sherman took—affording due respect to the FBI's terrorism designations when implementing the BOP's facially valid mandatory confinement policy—would violate that standard.

The answer to that question is "no." In *Iqbal*, this Court reviewed the FBI's "'arrest[ ] and det[ention] [of] thousands of Arab Muslim men'" in connection with its 9/11 investigation, as well as its policy of holding such detainees in "'highly restrictive conditions of confinement'" until cleared. 556 U.S. at 681. Because the attacks were "perpetrated by 19 Arab Muslim hijackers," the Court found it unsurprising "that a legitimate policy directing law enforcement to arrest and detain individuals because of their suspected link to the attacks would produce a disparate, incidental impact on Arab Muslims." *Id.* at 682. Such arrests were more likely motivated not by discriminatory bias, but rather by a "nondiscriminatory intent to detain" aliens "who had potential connections to those who committed terrorist acts." *Ibid.* The panel majority nowhere explained why every reasonable officer in Hasty and Sherman's circumstances would conclude otherwise with respect to the policies they were obligated to effect.

3. The panel did not suggest that Hasty and Sherman imposed the challenged conditions of their own volition based on "an express[ed] intent to punish." Pet.

App. 50a.[10] Nor could it: "[T]he decision to impose highly restrictive conditions was made" not by Hasty and Sherman, but "at BOP headquarters." *Ibid.* Instead, the fundamental premise of respondents' suit is that Hasty and Sherman became required—as a matter of clearly established law—to disregard the FBI's designations based on their own subjective assessments of respondents' terrorism connections. See *id.* at 51a-59a. No precedent supports that putative obligation. In fact, it is doubtful Hasty and Sherman even had that authority.

Neither Hasty nor Sherman were competent or authorized to decide whether detainees were "of interest" to the FBI's 9/11 investigation. Whether the detainees were "of interest" to the FBI's investigation was a matter for the FBI itself. Because the BOP's restrictive-condition requirements were facially valid, Pet. App. 31a, 50a-51a, Hasty and Sherman had no authority to disobey them either. It is well established that "an order requiring the performance of a military duty or act may be inferred to be lawful and it is disobeyed at the peril of the subordinate." *Manual for Courts-Martial, United States* art. 90(c)(2)(a)(i) (2012). Likewise, this Court has explained that "[p]olice are charged to enforce laws until and unless they are declared unconstitutional." *Michigan* v. *DeFillippo*, 443 U.S. 31, 37-38 (1979). "Society

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[10] In *Kingsley* v. *Hendrickson*, 135 S. Ct. 2466 (2015), this Court explained that *Wolfish* divides cases into two categories—those with "an expressed intent to punish" and those without. *Wolfish* "explain[ed] that, in the absence of an expressed intent to punish," pretrial detention conditions violate the Constitution if they are "not 'rationally related to a legitimate non-punitive governmental purpose.'" *Id.* at 2473-2474. The latter test is "solely an objective one." *Id.* at 2473; see *ibid.* (*Wolfish* applied "rationally related" standard without considering "the prison officials' subjective beliefs about the policy").

would be ill-served if its police officers took it upon themselves to determine which laws are and which are not constitutionally entitled to enforcement." *Ibid.*

So too here. Hasty and Sherman were "charged" with implementing BOP policy based on the FBI's terrorism determinations. It is an understatement to say "[s]ociety would be ill-served" if corrections officers took it upon themselves to second-guess our intelligence agencies in assessing terrorism-related risks. Indeed, as explained below, experience has taught that underestimating such risks can be calamitous. See p. 42 & n.12, *infra*.

Consequently, even using *Wolfish*'s general formulation, Hasty and Sherman's conduct was not clearly unlawful. Following a facially valid BOP confinement policy in view of terrorism designations provided by the FBI has a "legitimate nonpunitive governmental purpose." *Wolfish*, 441 U.S. at 561. It ensures terrorism assessments are made by those with expertise, information, and authority, and that jailers without experience in such matters do not jeopardize security based on their own untutored views. No clearly established law compels the contrary conclusion.[11]

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[11] Even if Hasty and Sherman's supposed belief that the FBI's terrorism designations were wrong were taken to suggest they had improper motives, but see pp. 39-40 & n.10, *supra*, that would not render *compliance* with facially valid orders clearly unconstitutional. See *al-Kidd*, 563 U.S. at 744 ("We hold that an objectively reasonable arrest and detention of a material witness pursuant to a validly obtained warrant cannot be challenged as unconstitutional on the basis of allegations that the arresting authority had an improper motive.").

B. The Complaint Does Not Plead Clearly Established Fourth Amendment Violations

The Fourth Amendment strip-search claims fare no better. Denying qualified immunity, the panel declared "'it was clearly established'" that "'strip and body-cavity searches [must] be rationally related to legitimate government purposes.'" Pet. App. 79a. The challenged policy was clearly unlawful, the panel held, because it required strip searches "when there was no possibility that [respondents] could have obtained contraband." *Id.* at 77a. That analysis, however, again fails to examine whether the policy was clearly unlawful in the circumstances Hasty and Sherman confronted.

Experience in similar circumstances had taught that failure to exercise extreme diligence can have devastating consequences. A few years before the events here, a "restrictively confined terrorist" attacked a prison guard, stabbing him in the eye with a knife fashioned from a contraband comb—with tragic consequences. Pet. App. 143a, 161a (discussing *United States* v. *Salim*, 690 F.3d 115 (2d Cir. 2012), cert. denied, 133 S. Ct. 901 (2013)).[12] As Judge Raggi explained in dissent, "it was hardly irrational for prison authorities to conclude that persons under investigation for terrorist connections should be strip searched both randomly in their cells and whenever they were moved from one location to another to ensure prison security." Pet. App. 161a.

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[12] After being attacked by a suspected al Qaeda member, the guard "suffered brain damage that left his right side partially paralyzed and interfered with other normal functions, including his ability to speak and write." *Salim*, 690 F.3d at 120.

Even if the contrary view were law, that law was not clearly established—a fact underscored by Judge Raggi's disagreement with the panel majority on whether such searches violate the Fourth Amendment. "If judges thus disagree on a constitutional question, it is unfair to subject [officials] to money damages for picking the losing side of the controversy." *Wilson* v. *Layne*, 526 U.S. 603, 618 (1999).[13]

C. Respondents' Allegations Do Not Plead a Clear Violation of § 1985(3)

Hasty and Sherman are entitled to immunity with respect to the § 1985(3) claim as well.

1. Section 1985(3) makes it unlawful for "two or more persons" to "conspire * * * for the purpose of depriving * * * any person or class of persons of the equal protection of the laws." For the reasons above, pp. 34-40, *supra*, the conduct challenged here did not violate respondents' clearly established equal-protection rights. A conspiracy to engage in that conduct thus would not amount to a clearly established violation of § 1985(3).

The Complaint also fails to allege a clearly established violation of § 1985(3) for two additional reasons. First, in 2001, it was unclear whether § 1985(3) even applied to federal officers. See Pet. App. 82a-83a; *Hasty*, 490 F.3d

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[13] The panel majority stated it was "bound" to deny qualified immunity because it had denied qualified immunity in *Hasty*, which it characterized as involving "substantially the same" Fourth Amendment claim. Pet. App. 79a. That prior ruling does not bind this Court, and its analysis features the defects identified above. See p. 38 n.9, *supra*. *Hasty*, moreover, emphasized allegations of *successive* strip searches. See 490 F.3d at 172. Here, respondents allege searches only after *intervening* events like movement between cells. Pet. App. 160a-161a.

at 176. Thus, when Hasty and Sherman acted, it could not have been clear to every reasonable officer that the alleged conspiracy would violate § 1985(3).

Second, under the intra-corporate (or intra-enterprise) conspiracy doctrine, a corporation's "employees, when acting within the scope of their employment, cannot conspire among themselves." *McAndrew* v. *Lockheed Martin Corp.*, 206 F.3d 1031, 1036 (11th Cir. 2000) (en banc); Pet. App. 82a. Here, the Complaint alleges a conspiracy among the DOJ Defendants and Hasty and Sherman. Pet. App. 347a (¶305). But the DOJ Defendants, Hasty, and Sherman all work for a single unit of government—the DOJ includes BOP and its employees. *Id.* at 82a-83a & n.46. For that reason, at least one district court has ruled that the Attorney General and BOP employees "cannot conspire together under Section 1985." *Id.* at 83a n.46. The panel majority thus admitted that it was far from clear whether the alleged conduct violated § 1985(3). It remanded for a determination whether DOJ and BOP should be considered a single enterprise. *Id.* at 83a. That remand demonstrates why immunity must be granted: It was not clear to the Second Circuit whether the alleged conduct amounted to a "conspiracy" proscribed by § 1985(3). *A fortiori*, it would not have been clear to "any reasonably competent officer."

2. Rather than require an unmistakable violation of § 1985(3), the panel denied immunity because it thought the conduct was clearly proscribed by other sources of law. In *Hasty*, the Second Circuit had denied immunity under § 1985(3) on the ground that "'[t]he proper inquiry is whether the *right* itself—rather than its *source*—is clearly established.'" *Hasty*, 490 F.3d at 177. Citing *Hasty*, the panel majority here declared that "'federal officials could not reasonably have believed that it was

legally permissible for them to conspire with other federal officials'" even "'without a definitive ruling from this Court on the application of section 1985(3).'" Pet. App. 83a.

That theory defies this Court's precedents. The "clearly established law" inquiry must be made *solely* by reference to the right the defendant was accused of violating. *Davis* v. *Scherer*, 468 U.S. 183, 194 n.12 (1984). In *Davis*, a state employee brought due-process and § 1983 claims alleging that he was discharged without appropriate process. *Id.* at 187. The terminated employee urged that qualified immunity should be denied because the defendants' conduct clearly violated a state regulation. *Id.* at 193-194. This Court disagreed, holding that "[o]fficials sued for violations of rights conferred by a statute or regulation * * * do not forfeit their immunity by violating some *other*" right. *Id.* at 194 n.12 (emphasis added). Those "officials become liable for damages only to the extent that there is a clear violation of the statutory rights *that give rise to the cause of action for damages*." *Ibid.* (emphasis added). Even if the defendants clearly violated a state regulation, they were entitled to immunity on the due-process and § 1983 claims because *those* provisions did not clearly prohibit the conduct. *Id.* at 194-195 & n.12.

The Court reiterated that holding in *Elder* v. *Holloway*, 510 U.S. 510 (1994). The question presented there was: "Is qualified immunity defeated where a defendant violates *any* clearly established duty," or "must the clearly established right be the federal right on which the claim for relief is based?" *Id.* at 515. The Court concluded that *Davis* "held the latter." *Ibid.* Here, the "claim for relief is based" on a putative violation of

§ 1985(3). Unless Hasty and Sherman clearly violated that provision, they are entitled to immunity.

III. The Allegations Do Not Meet *Iqbal*'s Plausibility Requirement

To survive a motion to dismiss under Rule 12(b)(6), "a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is *plausible* on its face.'" *Iqbal*, 556 U.S. at 678 (emphasis added) (quoting *Bell Atl. Corp.* v. *Twombly*, 550 U.S. 544, 570 (2007)). It does not suffice to "plead facts * * * 'merely consistent with' * * * liability." *Ibid.* The allegations must eliminate "'obvious alternative'" and "more likely" lawful explanations for the challenged conduct. *Id.* at 682. The Complaint does not meet that standard here.

A. The Complaint Does Not Plead Plausible Due-Process or Equal-Protection Claims Based on "Official" Conditions

In *Iqbal*, this Court reversed the Second Circuit's conclusion that the plaintiffs had plausibly alleged that the FBI detained "'thousands of Arab Muslim men'" in the wake of 9/11 with discriminatory intent. 556 U.S. at 681. The allegations failed to dispel the "'obvious alternative explanation'"—that the arrests were made with the "nondiscriminatory intent to detain aliens who were illegally present in the United States and who had potential connections to those who committed terrorist acts." *Id.* at 682. Given the origins of the 9/11 attackers, it was "unsurprising" that so many detainees would be Arab or Muslim. *Ibid.* Given that alternative explanation, "the purposeful, invidious discrimination" the plaintiffs asked the Court to infer was "not a plausible conclusion." *Ibid.*

Respondents' "official conditions" due-process and equal-protection claims fail for the same reason. Respondents theorize that Hasty and Sherman detained them in highly restrictive conditions without a "legitimate nonpunitive penological purpose" in violation of due process, or based on discriminatory animus in violation of equal protection. But the Complaint fails to overcome the obvious alternative explanation—that Hasty and Sherman were complying with the FBI's terrorism designations and BOP policies.

1. The panel did not dispute that the BOP policy—which required all detainees "of interest" to the FBI's terrorism investigation be housed in the most restrictive conditions permissible—served compelling purposes. It agreed that "national security concerns could justify detaining those individuals with suspected ties to terrorism in these challenged conditions" for a whole "litany of reasons." Pet. App. 46a. And the panel did not dispute that respondents were designated "of interest" by the FBI. *Id.* at 18a, 51a.

That designation provides the most "obvious" reason for respondents' detention in restrictive conditions. It was not discriminatory or arbitrary. Rather, the FBI provided terrorism designations and, cognizant of the FBI's expertise and authority, Hasty and Sherman followed them. As the OIG report observed, "the BOP accepted [the FBI's] assessment, since the BOP normally takes 'at face value' FBI determinations that detainees had a potential nexus to terrorism." J.A. 241. Even the panel majority accepted that "Hasty and Sherman *initially* believed that they would be housing only those detainees who were suspected of ties to terrorism." Pet. App. 52a.

The panel held that the Complaint overcame that alternative explanation by alleging that Hasty and Sherman "*eventually* knew that the FBI lacked any individualized suspicion for many of the detainees that were sent to the ADMAX SHU." Pet. App. 52a (emphasis added). Absent "individualized suspicion" of terrorism ties, "the restriction[s] or condition[s] * * * were 'arbitrary or purposeless.'" *Id.* at 45a-46a; see also *id.* at 50a-51a. But that theory does not even approach the "plausibility" threshold.

First, even assuming that Hasty and Sherman somehow came to "know" that the FBI's terrorism designations were wrong, that still does not overcome the most plausible reason for confining respondents in restrictive conditions: Whatever Hasty's and Sherman's personal beliefs, they deferred to the FBI's determinations in view of that agency's expertise, experience, and authority. The FBI, not the local jailers, has experience with national-security and terrorism matters. The FBI, not the local jailers, was conducting the 9/11 investigation. The FBI, not the local jailers, was charged with "identifying the terrorists who hijacked the airplanes and anyone who aided their efforts." J.A. 43. Indeed, Hasty and Sherman likely had no authority to overrule FBI designations or BOP policy dictating the confinement conditions to be imposed as a result. It is not plausible to infer "purposeful, invidious discrimination," *Iqbal*, 556 U.S. at 682, or arbitrarily punitive conditions, *Wolfish*, 441 U.S. at 538-539, from obedience to FBI determinations and binding policy from "BOP headquarters," Pet. App. 50a—even if one assumes Hasty and Sherman disagreed.

Second, the allegation that Hasty and Sherman "knew" respondents had no terrorism connections—and thus should not have been "of interest" to the FBI's

investigation—defies plausibility as well. Pet. App. 52a. According to the Complaint and the panel, Hasty and Sherman supposedly came to know that respondents had no terrorism connections because the MDC received "regular written updates" explaining why each detainee was arrested, as well as "'evidence relevant to the danger'" each detainee "'might pose' to the MDC." *Ibid.* According to the Complaint, those "updates often lacked any indication of a suspicion of a tie to terrorism." *Ibid.*

But the Complaint offers no reason why Hasty and Sherman would believe the FBI was sending, into a prison, "written updates" with *all* the potentially sensitive domestic and foreign intelligence information it was obtaining about detainees. The Complaint, moreover, alleges that the updates contained only "'evidence relevant to the danger [the detainees] might pose' *to the MDC*," Pet. App. 52a (emphasis added)—not all information intelligence agencies had gathered connecting detainees to terrorism. The allegation that Hasty and Sherman thereby *knew* the FBI had no individualized suspicion does not register as "'conceivable,'" much less cross "'the line from conceivable to plausible.'" *Iqbal*, 556 U.S. at 680.

2. Nor can the panel's alternative "mendacity" theory push the allegations across that line. Pet. App. 68a. Departing from the district court, the panel inferred discriminatory intent from an unspecified memorandum, with an unstated date and purpose, that supposedly contained the false statement that MDC "executive staff * * * had classified the 'suspected terrorists' as 'High Security' based on an individualized assessment." *Id.* at 68a-69a (quotation marks omitted); see *id.* at 53a. According to the panel, that was false because neither Hasty nor Sherman had conducted such an assessment. *Id.*

at 68a-69a. "[I]t is reasonable to infer," the panel declared, "that Hasty and Sherman approved this false document to justify detaining actual or perceived Arabs and Muslims in the harsh conditions of the ADMAX SHU" arbitrarily or "based on discriminatory intent." *Id.* at 69a.

As Judge Raggi pointed out, the panel's novel theory fails to account for the "obvious[] and more likely" explanation—that, in suggesting individualized assessments had been conducted, MDC officials were properly "rel[ying] on the FBI's designations." Pet. App. 157a. As the OIG report observed, "the BOP normally takes 'at face value' FBI determinations that detainees had a potential nexus to terrorism." J.A. 241. The cited document itself makes that clear.[14] It does *not* state that *MDC staff* "classified the 'suspected terrorists' as 'High Security.'" Pet. App. 279a (¶ 74). It says MDC staff "determined" that the detainees "*have been* classified"—presumably by the FBI—"as 'High Security' inmates." Hasty Pet. App., No. 15-1363, at 467a (emphasis added). The cited memorandum, moreover, was developed "to provide staff with consistent guidelines and procedures" in handling "suspected terrorism inmates" before they arrived: It is dated *three days* after the 9/11 attacks, *before* any respondent arrived at MDC.[15] It is not plaus-

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[14] The document is cited by and thus incorporated by reference in the Complaint. See 2 Moore's Federal Practice § 12.34[2] & n.35 (3d ed. 2015); *Brass* v. *Am. Film Techs., Inc.*, 987 F.2d 142, 150 (2d Cir. 1993) (court may consider document "in plaintiffs' possession or of which plaintiffs had knowledge and relied on in bringing suit").

[15] The memorandum is dated September 14, 2001. Hasty Pet. App., No. 15-1363, at 466a. The earliest any respondent was arrested or transported to the MDC is September 16, 2001. See Pet. App. 302a (¶ 142) (Abbasi); *id.* at 306a (¶¶ 157-158) (Mehmood); *id.* at

ible that a document dated *before* the detainees' arrival was intended to convey that Hasty and Sherman had personally made individualized determinations for unknown detainees.

The panel refused to accept the "obvious" and "likely" explanation that the memorandum was referring to the FBI's designations. That explanation, it asserted, was "belie[d]" by the Complaint's "alleg[ations] that the 'MDC Defendants were aware that the FBI had not developed *any information*' to tie the 9/11 detainees to terrorism." Pet. App. 70a. That makes no sense. The panel elsewhere acknowledged that Hasty and Sherman may have "*initially*" believed the designations lawful, and only "*eventually* knew that the FBI lacked any individualized suspicion for many of the detainees." *Id.* at 52a (second emphasis added). The panel nowhere suggested that Hasty and Sherman had already come to believe the FBI's designations were unfounded when the cited document was created, before any respondent arrived at MDC.

Far from supporting a "plausible" inference that Hasty and Sherman imposed the restrictive conditions of confinement with discriminatory intent, the document shows the opposite. It admonishes MDC staff to "perform their assigned duties in a professional manner" and prohibits "humiliat[ing] and provok[ing]" the detainees. Hasty Pet. App., No. 15-1363, at 466a ("Professionalism must be demonstrated at all times * * * ."). Because the allegations fail to refute the "obvious alternative" and lawful explanation for the official confinement conditions,

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311a (¶ 174) (Benatta); *id.* at 318a-319a (¶¶ 196-198) (Khalifa); *id.* at 324a (¶ 217) (Hammouda); *id.* at 328a (¶¶ 230-232) (Bajracharya).

the due-process and equal-protection claims—as well as the § 1985(3) claims—must fail. *Iqbal*, 556 U.S. at 682; see *Griffin* v. *Breckenridge*, 403 U.S. 88, 102 (1971) (requiring "racial, or perhaps otherwise class-based, invidiously discriminatory animus" under § 1985(3)).

B. Respondents Do Not Allege Plausible Fourth Amendment Claims

Respondents' allegation that "they were subject to unreasonable * * * strip searches" under an unwritten policy, Pet. App. 75a, fails *Iqbal*'s requirements as well.

1. The Complaint fails to plausibly allege Hasty's and Sherman's personal involvement. It avers that Hasty ordered other MDC officials to "design extremely restrictive *conditions of confinement*," and that the *confinement conditions* were "approved and implemented by Hasty and Sherman." Pet. App. 279a (¶ 75) (emphasis added). From that, the panel inferred that Hasty and Sherman *also* ordered and approved an *unwritten* "strip search policy." *Id.* at 76a. That, however, is just speculation. The supposed "policy" was "never put in writing." *Id.* at 292a (¶ 112). The Complaint offers no facts showing that Hasty and Sherman somehow reviewed or approved that unwritten policy.

The panel inferred the supposed "policy" from the treatment respondents allegedly received. See Pet. App. 76a-78a. Respondents claim that they were strip searched upon arrival at the MDC, after being transported to the ADMAX SHU, and "every time they were removed from or returned from their cell," including for lawyer visits, medical care, attending court hearings, or "being transferred to another cell." *Id.* at 292a (¶ 111). But there is no allegation that Hasty or Sherman was involved in or observed those searches, or that those

searches occurred pursuant to the policy Hasty or Sherman allegedly approved.[16]

2. In any event, the Complaint cites no facts suggesting Hasty or Sherman was aware of a strip-search policy not "reasonably related to legitimate penological interests." *Turner* v. *Safley*, 482 U.S. 78, 89 (1987). The no-reasonable-relationship requirement is met only when the "logical connection between the [policy] and the asserted goal is so remote as to render the policy arbitrary or irrational." *Id.* at 89-90. Here, the "policy" alleged in the Complaint had a "logical connection" to prison security concerns—the searches were conducted after events involving prisoner movements and visits. See p. 42, *supra*. The panel asserted that respondents were "strip searched when there was no possibility that they could have obtained contraband." Pet. App. 77a. But, as Judge Raggi noted, the judgment whether respondents could obtain contraband when being transferred in and out of their cells and meeting with others "is precisely the sort of 'difficult judgment[ ] concerning institutional operations' that [this] Court has concluded must be made by 'prison administrators.'" *Id.* at 161a (quoting *Safley*, 482 U.S. at 89).

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[16] The Complaint's allegation that searches "were documented in a 'visual search log' * * * *for review* by MDC management" cannot fill the gap. Pet. App. 293a (¶ 114) (emphasis added); see *id.* at 77a. The contents of the search log are undescribed; the Complaint does not suggest it contains details that make abuse obvious, or that they reveal a pattern showing abuse. Even if one assumes Hasty and Sherman reviewed the logs, that does not give rise to a plausible conclusion that they, through their "own individual actions," sanctioned the practices complained of. *Iqbal*, 556 U.S. at 676.

In the aftermath of 9/11, and in light of serious attacks by other terrorism detainees held under restrictive conditions, see p. 42 & n.12, *supra*, the unlawfulness of even an aggressive strip-search policy for designated detainees is hardly apparent. It is not plausible that Hasty and Sherman not only were personally involved in the strip searches but knew they were so "irrational" as to lack a "reasonabl[e] relat[ionship] to legitimate penological interests." *Safley*, 482 U.S. at 89.

C. The Complaint Does Not Plausibly Allege Hasty's Liability for the "Unofficial" Conditions

It is now settled that "Government officials may not be held liable for the unconstitutional conduct of their subordinates under a theory of *respondeat superior*." *Iqbal*, 556 U.S. at 676. Instead, plaintiffs must plead that each official violated the Constitution "through [his] own individual actions." *Ibid.* Supervisors are not liable for their subordinates' misconduct unless they "knew of, and disregarded" instances of abuse so serious and unaddressed or attended to by other means that it was incumbent on them to intervene. *Walker* v. *Schultz*, 717 F.3d 119, 125, 129 (2d Cir. 2013); see *Iqbal*, 556 U.S. at 676-677. The supervisor *must* have known of both the serious conditions and the circumstances that required the supervisor's intervention to prevent harm.

In this case, the Complaint alleges a range of unauthorized abuses by line-level correctional officers. That conduct does not reflect this Nation's (or Hasty's and Sherman's) values. But the Complaint fails to plausibly allege that Hasty or Sherman was responsible for that conduct. They are not alleged to have engaged in it themselves. Nor does the Complaint identify any instance where they witnessed those abuses. As the OIG report concluded, none of the abuse "was engaged in or

condoned by anyone other than the correctional officers who committed it." J.A. 299 n.130. And indeed, the panel found no plausible claim against Sherman. While the Complaint averred that "Sherman made rounds on the ADMAX SHU and was aware of conditions there," Pet. App. 260a(¶26), those "general and conclusory" allegations "lack[ed] a specific factual basis to support a claim that Sherman was aware of the particular abuses at issue." *Id.* at 57a.

The panel nonetheless upheld similar claims against Sherman's own supervisor, Hasty. See Pet. App. 56a-57a. Its analysis, however, was perfunctory at best. It consisted of a four-sentence paragraph that merely listed the allegations seriatim. *Iqbal*, however, requires analysis of the Complaint's plausibility—including the plausibility of the conclusions in light of other conceded allegations in the Complaint—not a mere recitation of allegations.

While the Complaint alleges generally that Hasty was made aware of abuse, Pet. App. 260a(¶24), it makes no allegation that any subordinate, anyone at BOP, or anyone at OIG informed Hasty of any guard misconduct, or, more properly, of misconduct that required his intervention because it was not being properly addressed by the ordinary mechanisms for redress within the prison. The panel primarily invoked "allegations that Hasty avoided evidence of detainee abuse by '*neglecting* to make rounds.'" *Id.* at 56a (quoting *id.* at 260a(¶24)) (emphasis added). Even assuming that allegation is true, the panel ignored the "obvious alternative explanation." *Iqbal*, 556 U.S. at 682. As Warden, Hasty oversaw an enormous facility. Consequently, before any 9/11 detainee arrived, Hasty had delegated primary "responsibility for supervising all MDC correctional officers, including those who

worked on the ADMAX," to the Captain of the MDC. Pet. App. 261a(¶27); see J.A. 232. The "Captain" was "the highest-ranking correctional officer with direct responsibility for custody operations in the ADMAX SHU." J.A. 230 n.95. Beneath him, the "SHU Lieutenant [wa]s directly responsible for supervision of the staff members assigned to the [ADMAX] unit." Hasty Pet. App., No. 15-1363, at 467a. That hierarchy explains any administrative distance between Hasty and daily events at the ADMAX SHU. Necessary delegation of authority and reliance on subordinates provides a far "more likely" explanation for any failure to make rounds. *Iqbal*, 556 U.S. at 682.

The panel suggested that certain paragraphs of the Complaint "detail[ ]" Hasty's awareness of abuse. Pet. App. 56a-57a. But no "detail" is provided, and even the generalized assertions fail to overcome "obvious" lawful explanations. For example, the panel identified allegations that "Hasty made it difficult for detainees to file complaints." *Ibid.* But the allegations do not suggest how Hasty was involved in those difficulties. In fact, the difficulty identified in both the Complaint and the OIG report had nothing to do with Hasty. From the time the ADMAX SHU was established, MDC had an organized system for registering and addressing prisoner complaints that was set forth in a manual to be given to prisoners. J.A. 239-240, 276-278. The impediment to filing complaints was the failure of some guards to provide, or to allow detainees to keep, those manuals. Pet. App. 301a(¶140); J.A. 276-278, 299-300. There is no allegation that Hasty ordered, knew of, or was involved with, that mistake.

The panel also invoked an allegation that staff members who reported abuse were called "snitches." Pet.

App. 55a. But the Complaint does not say Hasty used that term, or even that he knew others did. Pet. App. 281a (¶78).

And finally, the panel embraced the theory that Hasty's knowledge of serious abuse could be inferred because the abuses were so "pervasive" that video cameras were installed in cells and hallways. Pet. App. 57a. But the initial directive to put video monitors in cells issued within two days of 9/11, *before* respondents arrived and any abuse could have occurred. J.A. 279 & n.126. And any enhancements to the videotaping efforts reflect an "affirmative step[ ]" by "MDC management * * * to *prevent* potential staff abuse." *Id.* at 300 (emphasis added); see *id.* at 279-280.

The panel's opinion illustrates precisely how *Iqbal*'s "plausibility" analysis should *not* be applied.

CONCLUSION

The decision of the court of appeals should be reversed.

Respectfully submitted.

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RECORD
AND
BRIEF.

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REPLY BRIEF FOR PETITIONERS DENNIS HASTY AND JAMES SHERMAN

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INTRODUCTION

Respondents all but abandon the decision below. They do not defend the Second Circuit's novel source-of-right/mechanism-of-injury test for determining whether a *Bivens* context is "new." Their central argument rests on the assertion that "there is nothing to distinguish" their claims "from thousands of similar claims brought against prison guards and supervisors every year." Resp. Br. 77-78. But that assertion, like respondents' approach to "context" generally, would have this Court disregard everything respondents allege (and the Second Circuit accepted) about this context and the special factors it implicates. Detained just after 9/11, respondents were *all*

classified by the FBI as "of interest" to its terrorism investigation. See Hasty/Sherman Pet. 3-4 (citing Complaint). BOP headquarters directed Hasty and Sherman to detain foreign nationals so designated in the most restrictive conditions permissible. Pet. App. 50a-51a. Until now, respondents claimed that following that dictate violated their rights because Hasty and Sherman "knew" the FBI terrorism classifications were mistaken. They urged (and the Second Circuit held) that clearly established law required local jailers, like Hasty and Sherman, to disregard FBI terrorism classifications if they thought they knew better than the FBI.

"Special factors" preclude *Bivens*' expansion to that new context. Congress, not the courts, is best situated to decide whether to create a damages action against jailers for not superseding policy judgments relating to national security and immigration in the wake of an unprecedented attack. Litigating cases like this one, moreover, can implicate sensitive intelligence information.

Respondents' claims likewise cannot survive qualified immunity or *Iqbal*. Respondents cite no authority clearly establishing that jailers were constitutionally compelled to disregard FBI terrorism designations based on their own putative assessments. And they plead no facts making it plausible that Hasty and Sherman acted on punitive or discriminatory animus given the lawful alternative explanation—that they were abiding by FBI classifications and BOP directives.

Accordingly, respondents seek to reinvent their case, arguing "the 'FBI terrorism designations' * * * do not exist on the face of the complaint or OIG reports." Resp. Br. 82. But the Complaint repeatedly acknowledges them. So do the OIG reports, incorporated into the Complaint. So did the Second Circuit. And respondents have

waived any contrary assertion. Respondents similarly overreach in arguing, for the first time, the official confinement conditions were clearly unconstitutional even if the designations were correct. Briefing on the merits in this Court is not the time to rewrite a compiaint.

Nor does respondents' claim against Hasty based on "unofficial conditions"—unauthorized misconduct by guards—survive scrutiny. Respondents failed to plead a plausible claim that Hasty, as MDC Warden, knew of line-level guard abuses not being addressed through normal channels, thus requiring his special intervention, and rendering him personally liable for not doing so.

ARGUMENT

I. THE SECOND CIRCUIT IMPROPERLY EXTENDED *BIVENS* TO A NEW CONTEXT

Respondents do not dispute that, for over 35 years, this Court has refused to extend *Bivens* to any new contexts. Hasty/Sherman Br. 21-24. Respondents invoke statutes from 1974, 1988, and 1996 to argue that Congress "ratified" *Bivens*. Resp. Br. 21-23. But this Court has declined to extend *Bivens* to new contexts despite those enactments. See Hasty/Sherman Br. 21-22. Judicial creation of implied damages remedies remains "disfavored," *Ashcroft* v. *Iqbal*, 556 U.S. 662, 675 (2009), because "a decision to create a private right of action is one better left to legislative judgment in the great majority of cases," *Sosa* v. *Alvarez-Machain*, 542 U.S. 692, 727 (2004).

Besides, respondents offer no reason to believe any supposed ratification licenses *Bivens*' extension to *new* contexts, which is what respondents seek here. Any "ratification" would also incorporate the longstanding

principle that courts should not extend *Bivens* if "special factors" counsel hesitation. Special factors preclude *Bivens*' extension here.

A. This Case Presents a New *Bivens* Context

Respondents argue that special-factors analysis is unnecessary because this case does not involve a "new context." Resp. Br. 23. But they do not defend the Second Circuit's source-of-right/mechanism-of-injury test. See *id.* at 25 n.4. Instead, they propose a three-part test never adopted by any court. *Id.* at 24. Contrast Hasty/Sherman Br. 24. Respondents' new test defies the purpose of "new context" inquiry: to determine whether prior decisions have *already* "take[n] into account" any circumstances that might raise "'special factors counseling hesitation,'" *Chappell* v. *Wallace*, 462 U.S. 296, 298 (1983), or whether the proposed action "presents legal and factual circumstances *not* present" in earlier cases, making "a new [special-factors] assessment * * * necessary," Pet. App. 94a (Raggi, J. dissenting); Hasty/Sherman Br. 24.

1. Respondents' effort to apply their test illustrates its defect: It ignores *every* element of context that may raise special factors not considered in prior cases. As explained previously, Hasty/Sherman Br. 35-41, this case does not merely involve the detention of foreign nationals, unlawfully in the U.S., in 9/11's immediate wake. Respondents seek to hold local jailers liable for *not* disregarding FBI "of interest" classifications and the corresponding confinement conditions required by BOP. The jailers, they assert, should have followed their own beliefs about respondents' terrorism connections because they supposedly "knew" the FBI (the agency conducting the 9/11 investigation) was mistaken. Pet. App. 51a-54a. The very nature of that theory—that lower-level jailers

should overrule policy judgments and classifications potentially involving sensitive intelligence information in connection with the confinement of foreign nationals following an unprecedented terrorist attack—makes clear the context is new.

Respondents identify *no* decision of this Court that evaluated "special factors" in a remotely similar context. They do not explain how the special-factors analysis in garden-variety Eighth Amendment cases, *e.g.*, *Carlson* v. *Green*, 446 U.S. 14 (1980), could have evaluated them. The court of appeals cases they cite (Resp. Br. 26-29, 75-76) are no better, and most merely *assumed* a *Bivens* remedy was available. See *Brecht* v. *Abrahamson*, 507 U.S. 619, 631 (1993) (cases that "assume[ ]" a legal issue lack *stare decisis* effect). Respondents contend (at 77-78) that "there is nothing to distinguish" their claims "from thousands of" ordinary prisoner suits only by assuming away everything that distinguishes this context.

Respondents concede a context is "new" if it "creates previously unexplored separation of powers concerns." Resp. Br. 24. But they overlook the separation-of-powers concern this Court must evaluate: When courts decide the propriety of a judicially implied damages action, the question is not "the merits of the particular remedy sought"; it is "*who should decide*" whether to provide a remedy and define its boundaries—Congress or the courts. *Bush* v. *Lucas*, 462 U.S. 367, 380 (1983) (emphasis added). Because no prior decision has decided *Bivens* should be extended in remotely comparable circumstances, this context is unquestionably new.

2. Perhaps for those reasons, respondents attempt to rewrite their Complaint. They disavow the grounds on which they prevailed below—that local jailers were required to overrule FBI terrorism classifications in favor

of their own judgments. See Pet. App. 51a-54a; Hasty/Sherman Br. 10-12. Instead, they now claim that "the 'FBI terrorism designations' Petitioners invoke do not exist on the face of the complaint or OIG reports." Resp. Br. 82. But that defies the Complaint, the OIG reports, the Second Circuit's decision, and respondents' briefing in this Court.

The certiorari petitions clearly stated that, "[b]efore being sent to MDC, *respondents were designated by the FBI as 'of interest'* or 'high interest' to the 9/11 investigation." Hasty/Sherman Pet. 3-4 (emphasis added) (citing Complaint's allegations); see Ashcroft Pet. 3; Ziglar Pet. 7. They argued the significance of the FBI classifications at length. Hasty/Sherman Pet. i, 2, 15, 16, 19, 24, 28-29, 31. Respondents' brief in opposition *never* disputed the designations. To the contrary, respondents told this Court they were on a "list of individuals *designated 'of interest'* to the 9/11 investigation *by the New York field office of the FBI*." Br. in Opp. 6 (emphasis added). Any assertion that the designations "do not exist on the face of the complaint" is waived. See Sup. Ct. R. 15.2; *Baldwin* v. *Reese*, 541 U.S. 27, 34 (2004).

The assertion is also wrong. The Complaint alleges that respondents were identified as "of interest":

- "Abbasi was held as 'of interest' to the PENTTBOM investigation." Pet. App. 302a (¶ 143).
- "FBI headquarters stated that Mehmood was 'of interest' to the FBI." Pet. App. 309a (¶ 169).
- "Benatta was identified as 'of special interest' by the Joint Terrorism Task Force." Pet. App. 315a (¶ 187).
- Khalifa was "detained as 'of interest.'" Pet. App. 322a (¶ 211).

- "FBI Headquarters listed Hammouda as 'of interest.'" Pet. App. 326a-327a(¶226).
- "Bajracharya was 'of active investigative interest to the FBI.'" Pet. App. 328a-329a(¶233).

The assertion that the designations are not "[i]n the * * * OIG Reports" incorporated into the Complaint, Resp. Br. 82; see *id.* at 2-3; Pet. App. 253a(¶3 n.1), is also incorrect. The OIG report says:

- "[T]he *FBI's initial 'interest' classification* had an enormous impact on the detainees because it determined [where] they would be housed * * *." J.A. 304 (emphasis added); see J.A. 320-321.
- The BOP reported "*the FBI* * * * ma[de] an initial assessment of a detainee's possible links to terrorism," and "the BOP accepted this assessment, since the BOP normally takes 'at face value' *FBI determinations* that detainees had a potential nexus to terrorism and therefore were 'high risk.'" J.A. 241 (emphasis added).
- The "BOP Director" reported "th[e] *designation[s]* resulted from *the FBI's assessment*" and were "not the BOP's 'call.'" J.A. 220 (emphasis added); see J.A. 291 ("BOP played no role * * *. [T]hese decisions were made by the FBI * * *.").

The Second Circuit recognized the FBI's terrorism designations. Under the heading "The New York List and *the 'Of Interest' Designation*," Pet. App. 16a (emphasis added), the panel explained that "aliens encountered and arrested pursuant to a PENTTBOM lead in New York"—like respondents—"were designated 'of interest' (or special interest)," *id.* at 18a; *see id.* at 36a. That "'of interest' designation by an FBI agent," the court observed, "had significant implications." *Id.* at 17a.

Judge Raggi thus stated, "it is *undisputed* that *the FBI had designated each MDC Plaintiff* as a person 'of high interest' or 'of interest' * * *." *Id.* at 146a (emphasis added).

Respondents elsewhere concede that the "FBI * * * identif[ied] them as 'of interest' to the 9/11 investigation." Resp. Br. 51 (citing Pet. App. 267a-268a(¶47)); see *id.* at 56 (urging "the FBI" lacked sufficient information "prior to identifying them as 'of interest' to the 9/11 investigation"). Respondents prevailed below on the theory that Hasty and Sherman were constitutionally obligated to disregard FBI classifications because they "knew" they were wrong. Respondents cannot now reverse course and deny the classifications they previously pleaded and pressed on this Court.

B. Special Factors Preclude *Bivens*' Extension

1. Respondents' argument and the judgment below rest on the view that restrictive conditions were improper despite the FBI terrorism designations because Hasty and Sherman eventually became "'aware that the FBI had not developed any information'" tying respondents "'to terrorism,'" and thus should have followed their own assessments instead. The obvious implications of that contention—that jailers should face personal liability for not second-guessing policy and investigative decisions by expert agencies on matters of national security and immigration in the wake of an unprecedented terrorist attack—alone bespeak the need for "hesitation." Congress, not the courts, is best positioned to determine whether to create such a cause of action and to define its boundaries.

Respondents agree that "significant hesitation" is warranted before authorizing a *Bivens* action "interfering with the military chain-of-command." Resp. Br. 44.

They offer no reason why hesitation is less warranted before interfering in the law-enforcement command chain following a terrorist attack. Their *amicus* urges that BOP wardens are not "obligat[ed] to follow assessments from a different agency component like the FBI." Br. *Former Correctional Officers* 28. But that misunderstands the Complaint and the facts. Hasty and Sherman did not take direction from the FBI. The *BOP* required them to impose the most restrictive conditions permissible on detainees designated "of interest" by the FBI. Pet. App. 50a-51a; see p. 2, *supra*. Besides, whether to extend *Bivens* does not depend on whether jailers must follow FBI terrorism classifications. It depends on whether this Court should create a damages action against them for having done so.

2. Moreover, unlike the "thousands of" prisoner suits involving ordinary misconduct claims in ordinary circumstances respondents invoke, cases like this one could require discovery "into matters of * * * sensitive intelligence information." *Wilson* v. *Libby*, 535 F.3d 697, 710 (D.C. Cir. 2008), cert. denied, 557 U.S. 919 (2009). As we explained, Hasty/Sherman Br. 30-31 & n.6, respondents must *prove* (and Hasty and Sherman may dispute) that the FBI in fact lacked information connecting them to terrorism, and that Hasty and Sherman "knew" it. That implicates the need to discover potentially sensitive intelligence information. Given the obvious risks, Congress is best equipped to determine whether to authorize such litigation and establish "guidelines to ensure that litigation does not come at the expense of national security concerns." *Lebron* v. *Rumsfeld*, 670 F.3d 540, 555 (4th Cir. 2012); see Ashcroft Br. 26-27. Other than denying the existence of the FBI's classifications, respondents offer no response.

Respondents urge (at 41) that "[f]oreign relations interests" favor *Bivens*' extension here because it may foster better treatment of Americans abroad. But the *existence* of "foreign relations interests"—matters "'so exclusively entrusted to the political branches of government'"—counsels against judicial innovation. Hasty/Sherman Br. 32. The potential for lawsuits, which might involve intelligence information, could also deter foreign governments from "sharing intelligence resources to counter terrorism." *Arar* v. *Ashcroft*, 585 F.3d 559, 576 (2d Cir. 2009) (en banc); Hasty/Sherman Br. 31. Congress, rather than the courts, is the appropriate institution to assess and balance such risks.

3. Respondents' invocation of *Korematsu* thus is misplaced. Whether special factors preclude judicial creation of a damages action does not turn on the propriety of the executive action being challenged. It turns on "who should decide" to create the cause of action—Congress or the courts. *Bush*, 462 U.S. at 380.

For that reason, this Court cannot resolve this case by "'weigh[ing] reasons for and against the creation of a new cause of action,'" the way common law judges might. Resp. Br. 34 (quoting *Wilkie* v. *Robbins*, 551 U.S. 537, 554 (2007)). That may make sense when the special-factors analysis is focused on whether "it would be good policy" to have a damages claim, *Bush*, 462 U.S. at 390, such as whether the cause of action would be "workable," *Wilkie*, 551 U.S. at 555. But the question here is *who*—Congress or the courts—is best situated to decide whether to create that cause of action. It would make no sense for the Court to hold that special factors make this a context where *Congress* must decide, but then create the action itself anyway based on its own policy views.

II. HASTY AND SHERMAN ARE ENTITLED TO QUALIFIED IMMUNITY

A. The Complaint Does Not Plead Clearly Established Equal-Protection and Due-Process Violations

Qualified immunity may be denied only if it would have been "clear to a reasonable officer that *his conduct* was unlawful *in the situation he confronted.*" *Saucier* v. *Katz*, 533 U.S. 194, 202 (2001) (emphasis added). Here, the dispositive question is whether "every 'reasonable official would'" have understood that, as jailers, Hasty and Sherman were constitutionally obligated to overrule FBI designations and BOP policy based on their own supposed beliefs about respondents' terrorism connections. *Reichle* v. *Howards*, 132 S. Ct. 2088, 2093 (2012). No such obligation exists. Cf. *White* v. *Pauly*, No. 16-67, slip op. 7 (Jan. 9, 2017) (per curiam).

The panel asked instead whether it was "clearly established that * * * a condition of pretrial detention not reasonably related to a legitimate governmental objective is punishment" that violates detainees' "constitutional rights." Pet. App. 58a. That defies this Court's warning "'not to define clearly established law at a high level of generality.'" *Mullenix* v. *Luna*, 136 S. Ct. 305, 308 (2015); Hasty/Sherman Br. 36-39. Respondents do not contend otherwise.

Respondents again deny the FBI designated them "of interest" to the 9/11 investigation, Resp. Br. 82-84, urging that the FBI stated it "*might* [have been] interested in them," *id.* at 87. But the FBI's "of interest" designations are documented in respondents' Complaint, the OIG reports, and respondents' briefs. See pp. 5-8, *supra*. Respondents' insistence (at 87) that "some of the conditions" were "clearly unconstitutional in any circum-

stance"—even if the FBI designations were correct—is similarly foreclosed. Citing the decision below, the certiorari petitions stated there was *no dispute* that the official confinement conditions were lawful if respondents in fact had terrorism connections; respondents disputed only whether there was reason to suspect such connections. Hasty/Sherman Pet. 4; Ashcroft Pet. 22 ("no dispute that * * * restrictive conditions of confinement * * * could be lawfully imposed" where "the government had 'individualized suspicion of terrorism'"). Respondents disputed having *conceded* that point, but represented that the confinement conditions' constitutionality for detainees with suspected terrorism ties "is not relevant to these Petitions." Br. in Opp. 29 n.11. Respondents never explain how they can defend the judgment below on a theory they disclaimed as "not relevant."

Because the issue was undisputed, the panel majority agreed that designing and implementing the "'restrictive and secure conditions' alone would not sustain liability for" Hasty or Sherman. Pet. App. 50a-51a. "[N]ational security concerns," the panel found, "could justify detaining those individuals with suspected ties to terrorism *in these challenged conditions for [a] litany of reasons*," including those "articulated by [Judge Raggi's] dissent." *Id.* at 46a (emphasis added); see *id.* at 143a-144a (Raggi, J. dissenting). On petition for rehearing en banc, five more judges agreed. *Id.* at 241a (adopting dissent). It cannot be that "every 'reasonable official would'" have understood the conditions of confinement *themselves* were unconstitutional, "in any circumstance," where

every judge to consider the matter has concluded otherwise. *Reichle*, 132 S. Ct. at 2093.[1]

Respondents urge that, even if the confinement conditions were permissible "in light of the FBI's 'interest,'" a few respondents remained in those conditions "*after* they were cleared by the FBI of any connection to terrorism." Resp. Br. 89. But the Complaint nowhere alleges that Hasty or Sherman knew those individuals had been cleared but ordered detention nonetheless. See Pet. App. 315a-316a, 322a, 326a-327a(¶¶188, 211, 226, 227). The OIG report (incorporated into the Complaint) attributes such occurrences to "delay in notifying the MDC" of the clearances. See J.A. 292-293, 296. No clearly established law required officers to act on clearances not communicated to them.

B. The Complaint Does Not Plead Clearly Established Fourth Amendment Violations

Even apart from qualified immunity, prison administrators are entitled to "wide-ranging deference" in connection with "institutional security." *Bell* v. *Wolfish*, 441 U.S. 520, 547 (1979). Tragic experience had shown the risk of terrorism suspects obtaining contraband and inflicting life-threatening harm. See Hasty/Sherman Br. 42; Pet. App. 161a. Respondents' contention that the

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[1] Nor is it clear the specific conditions respondents invoke (at 84-85) would always be unconstitutional as alleged. The right to "exercise" is subject to a "safety" exception, *Williams* v. *Greifinger*, 97 F.3d 699, 707 (2d Cir. 1996), and exercise here was authorized five days a week, Hasty/Sherman Pet. App. 469a. Toilet paper and "hygiene items were passed out and then retrieved daily," Pet. App. 298a(¶130); Hasty/Sherman Pet. App. 472a. And *Gaston* v. *Coughlin*, 249 F.3d 156, 165 (2d Cir. 2001), involved living areas "near or well below freezing" for five months, not general allegations of "cold," Pet. App. 297a(¶127).

supposed strip-search policy was plainly unlawful ignores that circumstance. And while respondents urge the alleged policy permitted strip searches "'when there was no opportunity to acquire contraband,'" Resp. Br. 90, the searches identified in the Complaint all occurred after intervening events, Pet. App. 292a-293a(¶112); J.A. 391-393. Given circumstances and prior experience, respondents fail to show that every "reasonable officer" would have known the alleged policy was unlawful "in the [immediate post-9/11] situation" Hasty and Sherman "confronted." *Katz*, 533 U.S. at 202.[2]

Judge Raggi's agreement—joined by five other judges, Pet. App. 241a—underscores the point. *Id.* at 158a-162a. Even if "the fact of a dissenting opinion * * * does not itself mean qualified immunity must apply," Resp. Br. 90, it is probative of whether "no reasonable officer" could have thought the conduct lawful. And *Safford Unified School District No. 1* v. *Redding*, 557 U.S. 364 (2009), says judicial disagreements will not "automatically render the law unclear if we"—*i.e.*, this Court—"have been clear." *Id.* at 378. This Court has never held, much less clearly held, the Fourth Amendment prohibits such measures when dealing with foreign nationals identified as "of interest" to an FBI terrorism investigation.

C. The Complaint Does Not Plead a Clear Violation of § 1985(3)

Respondents do not dispute that, in 2001, it was far from clear that the conduct alleged here would violate § 1985(3). It was not clear that § 1985(3) applied to federal officers. Moreover, the intra-enterprise conspiracy doctrine might preclude the requisite conspiracy. See

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[2] *Hodges* v. *Stanley*, 712 F.2d 34, 35 (2d Cir. 1983), did not involve putative terrorism suspects.

Hasty/Sherman Br. 43-44; Pet. App. 83a & n.46. Respondents argue that applying the intra-enterprise conspiracy doctrine would be "inappropriate" here. Resp. Br. 92-93. But they cite no case "clearly establish[ing]" their view, and precedent pointed the other way. Hasty/Sherman Br. 44.

Respondents urge (at 92) that conduct clearly violating § 1985(3) is unnecessary if there is a clear equal-protection violation. *Davis* and *Elder* say the opposite: "[O]fficials become liable for damages only to the extent that there is a clear violation of *the statutory rights that give rise to the cause of action for damages*"—here, § 1985(3). *Davis* v. *Scherer*, 468 U.S. 183, 194 n.12 (1984) (emphasis added); see *Elder* v. *Holloway*, 510 U.S. 510, 515 (1994) (the "clearly established right" must "be the federal right on which the claim for relief is based"). Indeed, while § 1985(3) requires a *conspiracy* by covered persons, no actual equal-protection violation is required.[3]

III. The Allegations Do Not Meet *Iqbal*'s Plausibility Requirement

A. The "Official" Conditions Due-Process and Equal-Protection Allegations Fall Short

The Second Circuit's *Iqbal* analysis turned on the following proposition: Although Hasty and Sherman "*initially* believed that they would be housing only those detainees who were suspected of ties to terrorism," they "*eventually knew* that the FBI lacked any individualized suspicion for many of the detainees that were sent to the ADMAX SHU." Pet. App. 52a (emphasis added). Absent

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[3] While § 1985(3) prohibits "conspir[acies]" to deny "equal protection," it allows suit if an overt act "*injure[s]*" someone "in his person or property, *or deprive[s]* [him] of * * * any *right or privilege*." 42 U.S.C. § 1985(3) (emphasis added).

individualized suspicion, the panel ruled, the conditions were potentially "punitive," *id.* at 45a-46a, and "discriminatory," *id.* at 68a-69a.

1. That theory does not address the "'obvious alternative explanation'"—that Hasty and Sherman were following FBI classifications and BOP directives, not acting punitively or discriminatorily. Hasty/Sherman Br. 47-48; see *Bell Atl. Corp.* v. *Twombly*, 550 U.S. 544, 567-568 (2007) (conspiracy not plausible given "obvious alternative explanation" for conduct). Apart from their failed assertion that "the 'FBI terrorism designations' * * * do not exist," see pp. 5-8, *supra*, respondents have no answer.

The notion that Hasty and Sherman "knew" the FBI designations were wrong is likewise not plausibly pleaded. The Complaint alleged that Hasty and Sherman "knew" because the "updates" they received, providing why each detainee "was arrested" and "'evidence relevant to the danger he might pose' to the" institution, did not tie respondents to terrorism. Pet. App. 52a; see *id.* at 277a(¶69). But the Complaint offers no facts suggesting that jailers would believe the FBI was sending into prison, for jailer review, *all* FBI intelligence on detainee terrorism connections. Hasty/Sherman Br. 48-49. Nor does it offer any reason why Hasty and Sherman thought they had superior competence to the FBI. *Ibid.*; cf. J.A. 135. Rather, "it was believed that FBI Headquarters would have a broader perspective on the PENTTBOM investigation and would be in a better position to make an assessment of whether" a detained alien "was 'of interest' to the investigation." J.A. 106. "BOP accepted [the

FBI's] assessment," taking FBI determinations "'at face value.'" J.A. 241; see J.A. 220; pp. 6-7, *supra*.[4]

Respondents contend the Complaint was "not required" to explain "why particular defendants would believe particular things." Resp. Br. 83-84. To overcome qualified immunity on the theory that the jailers "knew" FBI terrorism designations were wrong, however, the Complaint must offer factual allegations making such knowledge plausible. See *Iqbal*, 556 U.S. at 680 (rejecting allegation that officials "'knew of' * * * harsh conditions of confinement"). The Complaint does not.

2. On discriminatory intent, respondents double-down on the panel-invented theory that intent could be inferred from a memorandum respondents characterize as "false." Resp. Br. 85-86; see *id.* at 86 ("'false document'"), 88 ("false memorandum"); Pet. App. 53a. According to respondents, the memorandum "falsely state[d]" that *MDC staff* made individual terrorism designations. Resp. Br. 85. Respondents accuse Hasty and Sherman of having "lied" in the memorandum "to conceal their failure to follow BOP policy," *id.* at 76, and urge that "mendacity" supports discriminatory intent, *id.* at 86.

We invite the Court to review the memorandum, which is neither mendacious nor false. Hasty/Sherman Pet. App. 466a-477a. It is dated *three days* after the 9/11 attacks, *before* any respondent *arrived* at MDC. It cannot plausibly be interpreted as saying that *MDC staff* had conducted individualized assessments for detainees

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[4] Respondents now state the "updates explain[ed] how each detainee *was connected to the 9/11 investigation*" or "*came to be considered 'of interest.'*" Resp. Br. 13, 82 (emphasis added). But the *Complaint* alleges the MDC received the reason for "arrest"—immigration violations—*not* connections to the FBI terrorism investigation. Pet. App. 277a (¶ 69).

who had not even arrived. Hasty/Sherman Br. 50-51 & n.15. Respondents offer no response. Nor can a memorandum dating before respondents' arrival plausibly "cover up" any failure to conduct periodic, individualized re-assessments for not-yet-arrived detainees. Resp. Br. 20.

The memorandum's text refutes any suggestion that it falsely represents that *MDC staff* had "classified the 'suspected terrorists' as 'High Security.'" Pet. App. 53a; *id.* at 279a (¶74). It states that MDC staff "have determined the suspected terrorists, *have been* classified as 'High Security' inmates"—presumably by the FBI. Hasty/Sherman Br. 50 (quoting Hasty/Sherman Pet. App. 467a) (emphasis added). There is no representation that MDC staff did the classifying. Respondents' assertion (at 86 n.21) that the comma after "terrorists" renders the statement "difficult to read" ignores basic grammar: Even with the comma, the memorandum uses passive voice, stating MDC staff determined that the detainees "*have been* [so] classified." And the memorandum dates from a time—three days after 9/11—when (even according to the Second Circuit) Hasty and Sherman "*initially*" believed the FBI classifications lawful. Pet. App. 52a.

The memorandum also directs MDC staff to treat the detainees with "[p]rofessionalism * * * at all times." Hasty/Sherman Br. 51 (quoting Hasty/Sherman Pet. App. 466a). It prohibits "humiliat[ing] and provok[ing]" the detainees. *Ibid.* That hardly evidences discriminatory intent. Respondents again offer no response.

The notion that the memorandum falsely sought to "cover up" not-yet-existing violations of BOP regulations involving not-yet-arrived detainees falls short in another respect. Respondents concede that "*BOP* ordered the detainees held in restrictive confinement." Resp. Br. 6-7

(emphasis added); see Pet. App. 50a. To the extent any "procedural protections" required periodic MDC review of detainee "security risks" in this context at all—the regulations relate to "administrative detention," not the special case of suspected terrorism detainees, Resp. Br. 84—BOP had determined that FBI "of interest" classifications, when still outstanding, provided the necessary basis for continuing restrictive conditions; "of interest" detainees were to remain in restrictive conditions until cleared by the FBI. See, *e.g.*, J.A. 230 ("policy that all September 11 detainees were to be held in the most restrictive conditions"); J.A. 295 ("instructions from BOP Headquarters" to "confine the September 11 detainees under secure conditions").

B. Respondents Do Not Allege Plausible Fourth Amendment Claims Against Hasty and Sherman

Respondents do not identify any allegations establishing Hasty's and Sherman's personal involvement in inappropriate strip-searches. They repeat the panel's error of inferring Hasty's and Sherman's involvement from a wholly conclusory allegation that Hasty and Sherman directed or approved *other* conditions of confinement. Pet. App. 76a, 279a(¶75). Without pleading facts that could substantiate even the terms of the putative unwritten strip-search policy, the Complaint does not come close to showing Hasty and Sherman were responsible for it. Hasty/Sherman Br. 52-53; pp. 13-14 & n.2, *supra*.

C. The Complaint Does Not Plausibly Allege Hasty's Liability for "Unofficial" Conditions

Respondents also liken their "unofficial conditions" claims against Hasty to "thousands of similar claims brought against prison guards and supervisors every

year." Resp. Br. 77-78. If the unofficial conditions claims were asserted only against guards who engaged in abuse, or their immediate supervisors, that might be true. But the claims here represent a strained effort to extend personal liability for particular incidents of unauthorized, line-level abuse, up the command chain to Hasty, the warden during the initial period (from September 11, 2001 until spring of 2002). Pet. App. 259a(¶24). While the Complaint alleges Hasty's knowledge of abuse, it fails to connect specific knowledge, at any particular time, to the specific instances of abuse that form the basis of respondents' claims.

The Complaint, moreover, expressly incorporates two OIG reports. Pet. App. 253a(¶3 n.1); J.A. 34-416. Its conclusory assertions must be evaluated in light of those reports' specifics. While the reports provide many examples of abuse by individual guards, *e.g.*, J.A. 336-416, they found abuse was not "engaged in or condoned by anyone other than the correctional officers who committed it," J.A. 299 n.130.[5] With the exception of when guards mistakenly withheld prison handbooks, see p. 23, *infra*, neither the OIG reports nor the Complaint identify *any* misconduct not processed consistent with BOP policies.

1. Officials are personally liable only where they violate the Constitution "through [their] own individual actions." *Iqbal*, 556 U.S at 676. Consequently, respondents must allege sufficient facts showing not just that Hasty was aware of abuses, but that he knew they would not be properly addressed through ordinary processes, thus requiring his personal intervention. Conclusory

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[5] Respondents (at 79) dismiss that statement in the first OIG report because the investigation was ongoing. But the second OIG report comprehensively examined "unofficial abuse" and nowhere contradicted that finding. J.A. 336-416.

allegations will not suffice. *Id.* at 678. The panel's approach below bears no resemblance to this Court's scrupulous review of the allegations in *Iqbal*. The panel failed to evaluate the Complaint's conclusory assertions in light of the administrative distance between Hasty—who ran a 2,600-inmate prison, J.A. 219 n.88—and the misconduct many levels beneath him. An allegation with sufficient "heft" to plausibly support deliberate indifference by a direct supervisor will not necessarily suffice for those further removed, who must rely on others to bring anything requiring special intervention to their attention.

Respondents urge that "Hasty willfully blinded himself to abuses by neglecting to make rounds as required by BOP policy." Resp. Br. 79. But the administrative distance between the warden and the ADMAX unit predated 9/11, see J.A. 232, and could not have been designed to insulate Hasty from responsibility. As we pointed out (Hasty/Sherman Br. 55-56), the Captain—"the highest-ranking correctional officer with direct responsibility for custody operations in the ADMAX SHU"—reported to the Associate Warden, who in turn reported to Hasty. See J.A. 230 n.95. The Captain had "responsibility for supervising all" officers in the ADMAX. Pet. App. 261a(¶27); see J.A. 232. Beneath him was a "Lieutenant * * * directly responsible for supervisi[ng]" staff in "the [ADMAX] unit," who made rounds and reviewed the logs. Pet. App. 261a(¶¶27-28); see Hasty/Sherman Pet. App. 467a. The Associate Warden also made rounds. Pet. App. 260a(¶26). With responsible deputies making rounds, the MDC's head does not exhibit "deliberate indifference" by not making rounds himself (if that were true). Respondents offer no answer.

2. Respondents' generalized assertion that Hasty was "'made aware'" of abuses (at 79-80) is fatally conclu-

sory. Respondents do *not* allege that *any* officials in charge of the unit suggested that any matter required his intervention or attention outside the ordinary course. Although guard misconduct occurred, the Complaint *acknowledges* that the BOP's Office of Internal Affairs, the FBI, and OIG investigated allegations of abuse. See Pet. App. 291a(¶107). Those investigations belie any contention that grievances were not processed through established channels (which the Complaint fails to allege in any event). Respondents do not allege any of those investigators called upon Hasty to undertake action he was not already taking.

In rejecting unofficial-conditions claims against Sherman, the Second Circuit recognized that the generalized assertion that supervisors "ignor[ed] direct evidence of such abuse, including logs and other official documents, videotapes, and detainee complaints" was insufficient. Pet. App. 280a(¶77) (asserting that "[a]ll the MDC Defendants" had such knowledge); see *id.* at 57a. Such allegations did not suffice, even combined with the claim that he allowed "'subordinates to abuse [respondents] with impunity'" and "'made rounds on the ADMAX SHU and was aware of conditions there.'" *Id.* at 57a.

Respondents cannot invoke similarly vague generalities against Sherman's superior, even further removed from misconduct. Prisoners assert grievances every day, and there are established procedures for addressing them. Knowledge of claimed abuse is insufficient to show a warden knew his personal intervention was required. The Complaint makes no effort to connect any specific information ostensibly known to Hasty to any preventable abuse suffered by any respondent—for example, there is no allegation Hasty knew a guard had abusive propensities, yet failed to prevent him from abusing

respondents. And respondents entirely abandon the Second Circuit's factually erroneous suggestion that the installation of video cameras somehow supports allegations of knowledge. Hasty/Sherman Br. 57.[6]

3. Respondents portray other allegations as more "detailed," Resp. Br. 79, but respondents' characterizations bear little resemblance to the allegations—particularly in light of facts in the incorporated OIG reports. For example, respondents conclusorily allege that "Hasty * * * ma[de] it difficult for detainees to file complaints." *Id.* at 80. Hasty, they urge, "barr[ed] them from normal grievance and oversight procedures." *Id.* at 8. Not so. The MDC had a system for addressing grievances, set forth in a handbook to be given each detainee. J.A. 239-240, 276-278. There is no suggestion that any grievance presented by a detainee was not processed in accordance with those procedures. The impediment cited in the Complaint was some guards' failure to allow detainees to keep those handbooks—based on an apparent (and promptly corrected) misinterpretation of policies concerning allowable reading material. Pet. App. 301a (¶ 140); J.A. 276-278 & n.124, 299-300.[7] The Complaint *nowhere* alleges that *Hasty* ordered, knew of, or was involved in that conduct—let alone that it was part of a plan to "bar" grievances.

Finally, respondents urge (at 80) that staff reporting abuse were harassed or called "snitches," and that Hasty

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[6] Respondents assert (at 9) that "[v]ideotapes that likely showed abuse were destroyed." But there is no allegation Hasty had control over the tapes. J.A. 404-407.

[7] The policy was amended within a month. J.A. 278. Respondents assert Hasty bears "some" blame for the prior, ambiguous policy. Resp. Br. 80. But "some" blame falls short of a purposeful effort to "bar" grievances.

"encouraged * * * harsh treatment * * * by himself referring to [respondents] as terrorists." See Pet. App. 57a. As to the former, the Complaint does not allege that *Hasty* called anyone a "snitch," or knew others did—let alone that he condoned it. Hasty/Sherman Br. 56-57.

That leaves the allegation that Hasty used the term "terrorists." But where, to whom, when, and the circumstances are unspecified—as well as whether he included the modifier "suspected." The only document respondents cite refers to detainees as "suspected terrorists," Hasty/Sherman Pet. App. 466a, which was consistent with their designation, with this Court's shorthand, see *Iqbal*, 556 U.S. at 683, and with how (according to respondents) higher officials described them to Hasty, Resp. Br. 6. Generally alleging the term's use in unspecified contexts, at unspecified times, cannot plausibly support the claim that Hasty encouraged, and is individually responsible for, otherwise unauthorized abuses by individual guards. The "unofficial conditions" claims cannot be sustained.

CONCLUSION

The decision of the court of appeals should be reversed.

Respectfully submitted.

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